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No. 85-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN MINING CONGRESS,

Petitioner,

v.

LEE M. THOMAS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY
and
ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether Congress, in authorizing a program under the Atomic Energy Act (AEA) for the regulation of uranium mill tailings in the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), intended to expand the scope of EPA's regulatory jurisdiction (i) when Congress defined EPA's authority under UMTRCA by using the same terminology that had been used to define that agency's authority under the AEA prior to UMTRCA, and (ii) when such a change would have meant granting to EPA jurisdiction reserved exclusively by the AEA to the Nuclear Regulatory Commission or the Secretary of Energy.

PARTIES TO THE PROCEEDING

Petitioner is the American Mining Congress, a national trade association whose members produce most of the Nation's metals, coal, uranium and other mineral products.*

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*In the court below, the American Mining Congress filed two petitions for review of EPA's regulations. In Nos. 83-1014, etc., 772 F.2d 617 (10 Cir. 1985), the following were also petitioners: United Nuclear Corporation, Homestake Mining Company, Quivira Mining Company, Kerr-McGee Corporation, Sierra Club, The Environmental Defense Fund, Inc., National Resources Defense Council, Southwest Research and Information Center, and Jean Slattery. In Nos. 83-2226, etc., 772 F.2d 640 (10th Cir. 1985), the following were also petitioners: United Nuclear Corporation, Homestake Mining Company, Amax, Inc., Solar Lobby, The Environmental Defense Fund, Inc., National Wildlife Federation, Sierra Club, Al Mangan, Chauncey Kepford and Judith H. Johnsrud. The State of Colorado intervened in both cases.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, American Mining Congress, petitions for a writ of certiorari to review the separate but related judgments of the United States Court of Appeals for the Tenth Circuit, both entered on September 3, 1985. Insofar as the question presented in this petition is concerned, the issues involved in these separate judgments of the Tenth Circuit are identical.

OPINIONS BELOW

The opinion of the court below, in *American Mining Congress, et al. v. Lee M. Thomas, et al.* (Nos. 83-1014, etc.), upholding EPA's "Inactive Sites" regu-

lations, is reported at 772 F.2d 617 (10th Cir. 1985). App. at 1a-41a. The opinion of the court below, in *American Mining Congress, et al. v. Lee M. Thomas, et al.* (Nos. 83-2226, etc.), upholding EPA's "Active Sites" regulations, is reported at 772 F.2d 640 (10th Cir. 1985). App. at 42a-63a.

EPA's "Inactive Sites" regulations, together with the preamble thereto, are reported at 48 Fed. Reg. 590 (January 5, 1983). App. at 68a-122a. The regulations are now codified at 40 C.F.R. §§ 192.00-192.23 (1985). EPA's "Active Sites" regulations, together with the preamble thereto, are reported at 48 Fed. Reg. 45,926 (October 7, 1983). App. at 123a-202a. The regulations are now codified at 40 C.F.R. §§ 192.30-192.43 (1985).[1]

JURISDICTION

The judgments of the court below in both cases were entered on September 3, 1985 and involve the identical question presented in this petition. The American Mining Congress timely filed a petition for rehearing which was denied by the court below on October 30, 1985. App. at 64a-67a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (1970), 5 U.S.C. App. pp. 1132-1137 (1982), are reproduced *infra*. App. at 203a-217a. Relevant portions of Title I of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), Pub.

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[1]All citations to 40 C.F.R. §§ 192.00-192.23 and 192.30-192.43 are to the 1985 edition.

L. No. 95-604, 92 Stat. 3021 (1978), as codified at 42 U.S.C. §§ 7901-7925 (1982),[2] are reproduced *infra*. App. at 233a-241a. Relevant portions of the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (1954), 42 U.S.C. §§ 2011 *et seq*,. as amended by Title II of UMTRCA and by the NRC Authorization Act of 1982 and 1983, Pub. L. No. 97-415, 96 Stat. 2067 (1983), are reproduced *infra*. App. at 218a-233a. EPA's Standards for Remedial Actions at Inactive Uranium Processing Sites, 40 C.F.R. §§ 192.00-192.23, and EPA's Environmental Standards for Uranium and Thorium Mill Tailings at Commercial Processing Sites, 40 C.F.R. §§ 192.30-192.43, are reproduced *infra*. App. at 113a-122a and 196a-202a, respectively.

STATEMENT

The American Mining Congress petitions on behalf of its members who produce substantially all of this Nation's domestic uranium. The Congress has declared: "The maintenance of a viable domestic [uranium] mining and milling industry is an essential part of a sound nuclear industry and is also vital to the long-range defense and security interests of the United States."[3] Yet the regulations at issue in this case place the very existence of this vital industry in jeopardy by imposing upon it unnecessary, detailed regulatory controls and staggering compliance costs

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[2]Unless otherwise indicated, all citations to the United States Code are to the 1982 edition.

[3]S. Rep. No. 1325, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3105, 3115 (1964); 42 U.S.C. § 2201(v).

in order to eliminate an insignificant risk of harm to the public health.[4]

In the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) Congress amended the Atomic Energy Act of 1954 (AEA) and expressly authorized the post-operational control of uranium mill tailings.[5] In the process, certain regulatory authority was divided among three federal agencies—the Environmental Protection Agency (EPA), the Nuclear Regulatory Commission (NRC), and the Department of Energy (DOE). UMTRCA's language and legislature history establish that this division of authority is to be consistent with Congress' overall nuclear regulatory scheme. Under this scheme EPA's jurisdiction is limited to promulgating general environmental standards applicable *outside* the boundaries of sites licensed under the Atomic Energy Act. The decisions of the court below, however, have affirmed EPA's improper assumption of regulatory jurisdiction *inside* the boundaries of such sites.

1. The Atomic Energy Act

The United States Government by a carefully planned series of decisions created, developed and

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[4]These costs, which the Department of Energy estimates to be about $4.4 billion, will be incurred not by a healthy industry, but by one recently declared nonviable by the Secretary of Energy. U.S. Department of Energy, "Herrington Determines U.S. Uranium Industry Not Viable; Orders Steps to Assist Industry," Press Release R-85-120 (September 26, 1985); Energy Information Administration, *Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment*, DOE/EIA-0477 (Washington, D.C. Sept. 1985) (study conducted pursuant to 42 U.S.C. § 2210b).

[5]Uranium mill tailings are the waste product resulting from the processing of uranium bearing ores.

regulated an atomic energy program. Initially, these efforts were limited to military programs, but after World War II, the Government undertook the development of a commercial atomic energy industry. This effort proceeded under the direction of the powerful Joint Committee on Atomic Energy in Congress and the Atomic Energy Commission (AEC).[6] To support this program, the Government created and nurtured a private domestic uranium mining and milling industry.[7]

In the Atomic Energy Acts of 1946 and 1954, Congress gave the AEC authority both to promote atomic energy and to oversee the processes used to create it.[8] Pursuant to this grant of authority, the AEC had exclusive jurisdiction to license and regulate the possession and distribution of source, byproduct and special nuclear materials.[9] Moreover, the 1954 Act expressly authorized the AEC to issue regulations for the protection of the public health and safety in connection with licensee operations. 42 U.S.C. § 2201(b), App. at 231a-233a.

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[6]*See generally* Harold P. Green and Alan Rosenthal, *Government of the Atom, The Integration of Powers*, New York 1963, pp. 25-30.

[7]See *generally Development, Growth, and State of the Atomic Energy Industry: Hearings Before the Joint Committee on Atomic Energy*, 84th Cong., 1st Sess. (1955); S. Rep. No. 1325, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3105, 3114-3115 (1964).

[8]Pub. L. No. 79-585, 60 Stat. 755 (1946); Pub. L. No. 83-703, 68 Stat. 919 (1954), 42 U.S.C. §§ 2011 *et seq.*

[9]42 U.S.C. §§ 2091-2095, 2111-2114, and 2071-2077.

2. Reorganization Plan No. 3 of 1970

Reorganization Plan No. 3 of 1970 created the Environmental Protection Agency and transferred to that new agency the AEC's authority to issue radiation protection standards for protection of the general public. 5 U.S.C. App. pp. 1132-1137, App. at 203a-217a. The authority transferred to EPA was, however, limited to the promulgation of "generally applicable environmental standards," which the Plan defined as

> [L]imits on radiation exposures or levels, or concentrations or quantities of radioactive materials, in the general environment *outside the boundaries* of locations under the control of persons possessing or using radioactive material.

Id. at 1133, App. at 205a (emphasis added). In his accompanying message, the President emphasized that the AEC was to "retain responsibility for the implementation and enforcement of radiation standards through its licensing authority." *Id.* In ratifying the Plan, Congress adopted this division of jurisdiction between EPA and the AEC (now the NRC).[10] *Id.*; *see also* 116 Cong. Rec. 33,871-33,884 (1970).

3. Uranium Mill Tailings Radiation Control Act of 1978

As originally enacted, the Atomic Energy Act did not expressly authorize the post-operational control

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[10]In 1974, Congress abolished the AEC and transferred its licensing and regulatory functions to the NRC. *See* Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (1974), 42 U.S.C. §§ 5801 *et seq.*

of uranium mill tailings. In 1978, Congress provided for such authority under the AEA when it enacted UMTRCA. Pub. L. No. 95-604, 92 Stat. 3021 (1978). This Act authorized EPA, DOE and NRC to achieve the "stabilization, disposal and control in a safe and environmentally sound manner" of uranium mill tailings at inactive and active mill sites. 42 U.S.C. § 7901, App. at 233a,-234a.

Under the regulatory scheme, EPA was to promulgate "standards of general application for the protection of public health, safety and the environment from radiological and non-radiological hazards associated with" uranium mill tailings. 42 U.S.C. §§ 2022(a) and 2022(b)(1), App. at 219a-220a and 220a-221a. DOE was then to select and perform remedial actions at designated inactive (not currently licensed) sites, with the concurrence of NRC, to assure compliance with EPA's general standards. 42 U.S.C. § 7918(a), App. at 239a. By the same token, at active (licensed) sites the NRC was to implement and enforce EPA's general environmental standards through the adoption of on-site engineering, design and management requirements. 42 U.S.C. §§ 2114 and 2022(d), App. at 229a-231a and 222a-223a.

4. EPA's Regulations

Although promulgated separately, EPA's inactive and active site regulations are essentially identical.[11]

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[11]EPA promulgated groundwater protection standards only for active sites. It decided not to do so for inactive sites based on its determination that there was no evidence of a significant risk of harm to health or the environment. EPA, *Final Environmental Impact Statement for Remedial Action Standards for Inactive Uranium Processing Sites*, Volume I, p. 50 (October

Compare 40 C.F.R. §§ 192.00-192.12, App. at 114a-117a, *with* 40 C.F.R. §§ 192.30-192.33,App. at 197a-201a.

EPA's groundwater standards for active sites, consist of a primary standard and a secondary standard. The primary standard requires installation of a liner beneath all new tailings piles and beneath lateral extensions of existing piles. 40 C.F.R. § 192.32(a)(1), App. at 198a. EPA's secondary standard requires that concentration levels of various potentially hazardous constituents in groundwater at the edge of tailings piles not exceed certain numerical limits. 40 C.F.R. § 192.32(a)(2), App. at 199a. 48 Fed. Reg. at 45,942, App. at 182a.

EPA's radiological standards require that tailings disposal site controls be designed to assure that radon emissions from the surface of tailings piles be reduced to certain numerical limits. 40 C.F.R. § 192.32(b)(1)(ii), App. at 200a. The primary purpose of this standard is to require a thick earthen cover over tailings piles. 48 Fed. Reg. at 45,935-45,936, 45,940 (October 7, 1983), App. at 158a-159a, 173a-174a. EPA also requires cleanup of radium in soil within the licensed mill site area. 40 C.F.R. § 192.32(b)(2), App. at 200a-201a.

All tailings piles are located inside the boundaries of mill or disposal sites. Thus, EPA's regulations operate inside the boundaries of these sites and impose specific engineering, design and management requirements.

1982). Instead, EPA directed that any remedial action at the inactive sites be based upon the implementing agencies' evaluation of site-specific conditions. 48 Fed. Reg. 599, App. at 103a-105a.

5. The Proceedings Below

The American Mining Congress (AMC), on behalf of its members, filed timely petitions for review of the inactive and active sites regulations in the court below pursuant to 42 U.S.C. § 2022(c)(2). AMC contended that the statutory language, legislative history, and regulatory scheme of UMTRCA evince Congressional intent that EPA's authority be limited to the promulgation of generally applicable standards for the protection of the general environment *outside* the boundaries of mill tailings sites. AMC argued that EPA lacks jurisdiction under the Atomic Energy Act to promulgate standards that operate *inside* the boundaries of mill tailings sites or that impose engineering control methods, because this authority was conferred by Congress upon DOE and NRC—not EPA.[12]

On September 3, 1985, the court below rendered judgment in both cases and, on the issue presented in this petition, held that EPA's regulations are within that agency's authority. The court justified this conclusion as follows: first, the phrase "outside the boundaries" does not appear in UMTRCA; second, the legislative history and administrative interpretations on the issue of EPA's jurisdiction "are less than clear;" and third, EPA's assumption of such jurisdiction is consistent with the general policy of UM-

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[12]AMC also asserted that EPA's standards were invalid because EPA did not make a finding that mill tailings present a significant risk of harm to public health or the environment, as required by UMTRCA. Other petitioners below, United Nuclear Corporation, *et al.*, are filing a Petition for a Writ of Certiorari, which addresses this question. AMC joins in their petition to this Court. *See* Supreme Court Rule 19.4.

TRCA to protect public health. 772 F.2d at 630, 646, App. at 21a-22a, 50a.

REASONS FOR GRANTING THE WRIT

The decisions below raise important questions under the Atomic Energy Act, as amended, requiring resolution by this Court. By summarily affirming EPA's assumption of regulatory jurisdiction inside the boundaries of mill tailings sites, the decisions do violence to Congress' comprehensive and pervasive regime for the regulation of uranium mill tailings under the AEA, as amended. In reaching its erroneous result, the court below ignored plain statutory language, clear legislative history, and unambiguous administrative interpretations of the statute by the agencies themselves. Moreover, the court below disregarded a relevant decision of this Court establishing the principle that changes in the pervasive regulatory scheme embodied in the AEA are not to be inferred absent clear indication of legislative intent. *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976) (*Train v. Colorado PIRG*). Finally, the decisions create the potential for disruption and chaos in the regulatory process that will cause irreparable harm to the Nation's uranium industry and to the public interest.

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EPA's standard setting authority under the Atomic Energy Act is strictly limited by the 1970 Reorganization Plan to "generally applicable environmental standards," which are limits on exposures "in the general environment *outside the boundaries* of locations under the control of persons possessing or using

radioactive material." 5 U.S.C. App. p. 1133, App. at 205a (emphasis added). NRC, as successor to the AEC, is "responsible for implementation and enforcement of radiation standards through its licensing authority." *Id.* This division of authority is well settled.[13]

In authorizing a program under the Atomic Energy Act for the regulation of uranium mill tailings, Congress in UMTRCA manifested its intent to continue the limitation on EPA's authority under the AEA. It did so by granting EPA authority to promulgate "standards of general application" for the protection of the public health, safety and the environment, and by granting NRC the authority for "[i]mplementation and enforcement of the standards." 42 U.S.C. §§ 2022(a), (b) and (d), and 2114, App. at 219a-221a, 222a-223a, and 229a-231a. By using the same terminology in UMTRCA as employed in the 1970 Reorganization Plan,[14] Congress manifested its intent to

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[13]*Train v. Colorado PIRG*, 426 U.S. at 24 n. 20; *AEC-EPA Memoranda of Understanding With Respect to AEC Facilities*, 38 Fed Reg. 24,936 (September 11, 1973) and 38 Fed. Reg. 32,965 (November 29, 1973); EPA, *40 C.F.R. 190 - Environmental Radiation Protection Requirements for Normal Operations of Activities in the Uranium Fuel Cycle: Final Environmental Statement*, EPA 520/4-76-016 (November 1, 1976) ("Two points are relevant to EPA's authority to set environmental radiation standards. First, . . . the *standards can apply only outside the boundaries* of facilities producing radioactive effluents. . . .") (emphasis added). Most recently, this division of jurisdiction was recognized in another amendment to the AEA. *See* Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201, 2228, 42 U.S.C. § 10101, 10141 (1982).

[14]42 U.S.C. §§ 2022(a) and 2022(b)(1), App. at 219a and 220a, use the phrase "*standards of general application* for the protection of the public health, safety and the environment," while

continue for mill tailings the pre-existing division of jurisdiction:

> [I]t is well settled that, absent evidence to the contrary, words or phrases taken from prior legislation will be given the same meaning, since there is hardly a basis for assuming that the lawmakers had anything else in mind. This consideration is even more compelling where, as here, the provision containing the word in question is part of a statute that is merely a continuation of earlier legislative schemes.

United Shoe Workers of America, AFL-CIO v. Bedell, 506 F.2d 174, 183 (D.C. Cir. 1974).[15]

This natural presumption of congressional intent is nowhere rebutted and indeed is affirmed by the legislative history of UMTRCA, as well as administrative interpretations by the agencies prior to this controversy.

The Report of the House Committee on Interior and Insular Affairs expressly states that EPA's au-

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the 1970 Reorganization Plan, as ratified by Congress, uses the phrase "*such generally applicable environmental standards* for the protection of the general environment." (emphasis added). That no meaningful difference was intended by Congress in these two phrases is indicated by the similar, although not identical, language of 42 U.S.C. §§ 2022(b)(2) and 2114(a)(2), App. at 221a and 230a, which use the phrases "*such generally applicable standards*" and "*applicable general standards*," respectively, in describing EPA's authority. (emphasis added).

[15]*See also Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); *United States v. 101.80 Acres of Land*, 716 F.2d 714, 723, n. 13 (9th Cir. 1983); 1A *Sutherland Statutory Construction* § 22.33 (C. Sands 1972).

thority is limited to promulgation of "generally applicable standards" for the protection of the general environment "outside the boundaries" of mill tailings sites and that NRC "must set all . . . requirements relating to management concepts . . . including [among other things] lining for tailings ponds, depth, and types of tailings covers . . . ."[16]

The Report of the House Interstate and Foreign Commerce Committee quotes with approval an August 9, 1978, letter from the Administrator of EPA stating that under UMTRCA the Agency would "*retain* its generally applicable standards-setting authority under the Atomic Energy Act" (*i.e.*, as transferred by the 1970 Reorganization Plan), and NRC would establish "management requirements."[17]

Moreover, the testimony of William D. Rowe, EPA Deputy Assistant Administrator for Radiation Programs, and Joseph M. Hendrie, Chairman of NRC, before the House Commerce Committee reflect the understanding of both agencies that EPA's jurisdiction to promulgate "generally applicable standards" was to be exercised *outside* the boundaries of mill tailings sites and that NRC's jurisdiction was to be exercised *inside* the boundaries.[18]

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[16]H.R. Rep. No. 1480, Part 1, 95th Cong., 2d Sess. 16-17, 21, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7433, 7438-7439, 7444 (1978).

[17]H.R. Rep. No. 1480, Part 2, 95th Cong., 2d Sess. 46, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7450, 7473 (1978) (emphasis added).

[18]Uranium Mill Tailings Control Act of 1978: Hearings on *H.R. 11698, H.R. 12229, H.R. 12938, H.R. 12535, H.R. 13049, H.R. 13382 and H.R. 13650 Before the Subcommittee on Energy and*

Furthermore, the agencies' interpretations of the term "generally applicable standards" in UMTRCA are also unambiguous and confirm their understanding that their jurisdiction was so divided. In a 1981 legal opinion, EPA's General Counsel affirmed that EPA's authority under UMTRCA was "modelled closely on *comparable authority* contained in the Atomic Energy Act as transferred to EPA in Reorganization Plan No. 3 of 1970 and should be understood, therefore, in the light of *the same term* as used in that Plan."[19] Similarly, NRC's counsel has stated:

> It is also plain from the legislative history of UMTRCA that Congress intended the Commission to be lead federal agency in regulating uranium mill tailings and that Congress sought to preserve the traditional regulatory relationship between NRC and EPA. . . . Under UMTRCA, the NRC was designated as the principal regulator of mill tailings while *EPA was authorized to promulgate general environmental standards for mill tailings*

Power of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 366, 392-393, 396, 397 (August 2, 1978) (emphasis added). For example, Mr. Rowe testified: "General[ly] applicable standard is defined in the Atomic Energy Act. This is where the language comes from, and it is the section that we use to set the standards *outside the boundaries*." Mr. Hendrie testified that "inside the site boundary" is "the proper province of the NRC." *Id.* at 393, 396 (emphasis added).

[19]Memorandum of October 16, 1981, from Robert M. Perry, General Counsel, to Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, "Authority to Promulgate Generally Applicable Standards Pursuant to Uranium Mill Tailings Radiation Control Act," (emphasis added), App. at 242a-244a.

consistent with its authority under Reorganization Plan No. 3 of 1970.[20]

Notwithstanding this unequivocal evidence that Congress intended in UMTRCA to limit EPA's authority over mill tailings consistent with its general authority under the Atomic Energy Act, the court below summarily affirmed EPA's assumption of jurisdiction *inside* the boundaries of mill tailings sites. Barely mentioning, much less evaluating, the merits of this fundamental jurisdictional issue, the court justified its decision by simply noting that the words "outside the boundaries" do not appear in UMTRCA, that the legislative history and administrative interpretations of the statute are "less than clear," and that the general purpose of UMTRCA appears to be served by EPA's regulations. 772 F.2d at 630, 646, App. at 21a-22a, 50a.

As demonstrated above, the court's statement that the legislative history and administrative interpretations are "less than clear" is plainly wrong. For reasons also addressed above, the absence of the phrase "outside the boundaries" is irrelevant.[21] And

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[20]NRC Brief at 92-93 (emphasis added), *Kerr-McGee Corp., et al. v. NRC*, 673 F.2d 1124 (10th Cir. 1982) (opinion withdrawn and rehearing granted, October 6, 1982).

[21]As in the decisions below, the Tenth Circuit in *Colorado PIRG v. Train* relied upon the absence of specific statutory language:

> The statute does not say "some" radioactive materials . . . . No exceptions having been set forth in the statute as concerns radioactive materials, it would follow that the term "radioactive materials" means *all* radioactive materials, and

the reliance of the court below on the general purpose of the statute to uphold EPA's jurisdiction is equally inappropriate because Congress has specifically addressed the question and made its intent clear. The court below cannot substitute its judgment for that of Congress. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, ___, 104 S. Ct. 2778, 2781-82 (1984).

II

Almost ten years ago, in *Train v. Colorado PIRG*, *supra*, this Court specifically addressed, at EPA's request, the same fundamental issue presented here. Strictly speaking, the decisions below are not in conflict with the holding of this Court in that case, because the issue there presented concerned the intent of Congress in the Federal Water Pollution Control Act (FWPCA). However, the decisions below are in conflict with the basic principles governing the relationship of EPA, NRC and DOE under the Atomic Energy Act—principles recognized and relied upon by this Court in *Train v. Colorado PIRG*.[22]

In that case, a citizens group sought to compel EPA to regulate radioactive effluents from nuclear power plants under the FWPCA. EPA had disclaimed such authority, because these materials were regulated un-

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we so hold.

507 F.2d 743, 747 (10th Cir. 1974) (emphasis in original). This Court in reversing made clear that such simplistic reasoning was unacceptable, where relevant evidence of congressional intent is available as it is here. *Train v. Colorado PIRG*, 426 U.S. at 9-10.

[22]426 U.S. at 24 n. 20 (quoting the 1970 Reorganization Plan).

der the Atomic Energy Act. Relying on the "plain language" of the FWPCA (and ignoring the legislative history of that act as well as the comprehensive regulatory scheme of the Atomic Energy Act), the Tenth Circuit held that EPA must regulate all radioactive materials under the FWPCA, including those regulated under the Atomic Energy Act. In reversing, this Court stated:

> To have included these materials under the FWPCA would have marked a significant alteration of the pervasive regulatory scheme embodied in the AEA. Far from containing the clear indication of legislative intent that we might expect before recognizing such a change in policy, the legislative history reflects, on balance, an intention to preserve the pre-existing regulatory plan.

Id. at 24 (emphasis added) (footnote omitted).

This reasoning is equally controlling here. Certainly, the pervasive regulatory scheme established under the Atomic Energy Act is the same. Here, as there, a significant change in the regulatory scheme should be recognized only if a clear indication of legislative intent to do so is discerned. In both instances, the statutory language and legislative histories reveal an intent to continue the existing regulatory scheme of the Atomic Energy Act. Indeed, in the instant case the evidence that no change was intended under UMTRCA is overwhelming.

III

The potential for disruption created by the decisions below is real and substantial. With the division of regulatory jurisdiction among EPA, NRC, and DOE disrupted, conflicts between the agencies are inevitable, and the uranium industry—and the public—will suffer. Indeed, a dispute has already arisen between NRC and EPA about the administration of the UMTRCA program that may keep it in turmoil for years to come. NRC has asserted authority under Section 84(c) of UMTRCA, 42 U.S.C. § 2114(c), to modify EPA's standards in individual licensing proceedings without EPA's concurrence. 49 Fed. Reg. 46,421 (November 26, 1984); 50 Fed. Reg. 41,853 (October 16, 1985). Further, NRC has not adopted EPA's groundwater standards and has issued only an advanced notice of proposed rulemaking to consider the extent to which it will conform its existing regulations to EPA's groundwater standards. 49 Fed. Reg. 46,425-46,428 (November 26, 1984). EPA disputes NRC's authority to alter EPA's standards in licensing proceedings without its concurrence. EPA also asserts that NRC should adopt EPA's groundwater standards in their entirety without change.[23] In short, the decisions of the court below, by disrupting the long-standing relationships among EPA, NRC and DOE under the

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[23]EPA Comments, January 15, 1985, on NRC Proposed Conforming Requirements, App. at 246a-250a. EPA Comments, March 8, 1985, on NRC ANPR on Groundwater Protection Standards, App. at 251a-259a.

Atomic Energy Act, promote a result that Congress specifically sought to avoid in UMTRCA.[24]

The impact of these cases is also far-reaching. EPA's regulations will affect every uranium milling operation in the United States—past, present and future—and according to recent testimony of DOE officials before Congress, the costs for existing active sites alone may be about $4.4 billion, excluding costs of groundwater reclamation.[25] These costs will be imposed upon an essential, but now nonviable, industry, and could lead literally to its demise. This, we submit, is a result detrimental to the nation's security and energy needs, clearly not in the public interest, and manifestly contrary to the intent of Congress.

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[24]Senator Domenici, a co-sponsor of a related bill (S.2548), indicated during debate that a "basic principle" of the bill was to create a regime avoiding potential conflict of jurisdiction between the agencies. Senator Domenici stated:

> A basic principle of the amendment is the creation of a unified regime for mill tailings so that the various distinct materials which make up a single mill tailings pile need not be subject to fregmented [sic], duplicative and potentially conflicting regulatory activities by different government agencies.

124 Cong. Rec. S15323 (daily ed. September 18, 1978).

[25]Pre-Hearing Questions and Answers Relating to the July 16, 1985 Hearing on H.R. 2236 and S. 1004: *Financing Remedial Actions at Active Uranium and Thorium Processing Sites Before the House Committee on Interior and Insular Affairs Subcommittee on Energy and the Environment and the Senate Committee on Energy and Natural Resources Subcommittee on Energy Research and Development*, Witness: James W. Vaughan, Jr., Acting Assistant Secretary for Nuclear Energy, U.S. Department of Energy, at 3.

CONCLUSION

For these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-1014
83-1041
83-1206
83-1300

AMERICAN MINING CONGRESS, UNITED NUCLEAR CORPORATION, HOMESTAKE MINING COMPANY, QUIVIRA MINING COMPANY, KERR-MCGEE CORPORATION, SIERRA CLUB, THE ENVIRONMENTAL DEFENSE FUND, INC., NATIONAL RESOURCES DEFENSE COUNCIL, SOUTHWEST RESEARCH AND INFORMATION CENTER, AND JEAN SLATTERY,
Petitioners,

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, AND ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

STATE OF COLORADO,
Intervenor

FILED

September 3, 1985

Petition for Review of the Standards Promulgated by the Environmental Protection Agency

Anthony J. Thompson (Charles E. Sliter, Robert F. Reklaitis, Edward S. Shipper, Jr., and Edward A. McCabe, of counsel, with him on the briefs) of Hamel, Park, McCabe & Saunders, Washington, D.C., for American Mining Congress.

Peters J. Nickles (Charles H. Montange, Richard A. Meserve, and William F. Greaney, also of Covington & Burling, Washington, D.C., and G. Stanley Crout, Sunny J. Nixon and Michael S. Yesley of Stephenson, Carpenter, Crout & Olmstead, Santa Fe, New Mexico, with him on the briefs) for United Nuclear Corporation, Kerr-McGee Nuclear Corporation, Kerr-McGee Corporation, and Homestake Mining Company.

Roger Beers (Kathryn Burkett Dickson, also of Beers & Dickson, San Francisco, California, and Robert E. Yuhnke, Environmental Defense Fund, Boulder, Colorado, with him on the briefs) for Sierra Club, Environmental Defense Fund, Natural Resources Defense Council, Southwest Research and Information Center, and Jean Slattery.

David W. Zugschwerdt, Attorney (F. Henery Habicht, II, Acting Assistant Attorney General, Jose R. Allen, Attorney, also of Department of Justice, Washington, D.C., and A. James Barnes, Acting General Counsel, William F. Pedersen, Associate General Counsel, and Charles S. Carter, Assistant General Counsel, of counsel, Environmental Protection Agency, Washington, D.C., with him on the briefs) for Respondents.

Duane Woodard, Attorney General, Charles B. Howe, Deputy Attorney General, Richard F. Forman, Solicitor General, and Richard L. Griffith, Assistant Attorney General, Denver, Colorado, filed briefs for the State of Colorado.

Walter Perry, III, Senior Assistant Attorney General, Dennis M. Boal, Assistant Attorney General, James M. Ellerbe, Legal Intern, Cheyenne, Wyoming, filed an amicus curiae brief for the State of Wyoming.

Before LOGAN and McWILLIAMS, Circuit Judges, and BOHANON, District Judge.*

LOGAN, Circuit Judge.

*Honorable Luther L. Bohanon, Senior United States District Judge for the District of Oklahoma, sitting by designation.

These consolidated cases involve challenges to the Environmental Protection Agency's (EPA) standards for the cleanup and disposal of uranium mill tailings originating from designated inactive mill sites. The EPA established these standards pursuant to its authority under the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), as amended, 42 U.S.C. §§ 2022 and 7901-7942. The UMTRCA required the EPA to promulgate standards that could be applied generally to protect the environment and the public health and safety from radioactive and nonradioactive hazards posed by uranium mill tailings at both active and inactive processing sites. Under the statutory scheme the federal government and the affected state share the costs of the remedial action taken to control mill tailings, *see* 42 U.S.C. § 7917, with the possibility of later reimbursement from private parties, *id.* § 7925. The EPA standards that we review here pertain only to inactive mill sites. In a companion case released this day we review regulations relating to active mill sites. *See American Mining Congress v. Thomas*, 772 F.2d 640 (10th Cir. 1985) (*Active Sites Case*).

The following parties filed petitions for review of these standards: the American Mining Congress, a trade association; joint petitioners United Nuclear Corporation, Kerr-McGee Corporation, Kerr-McGee Nuclear Corporation, and Homestake Mining Company; joint petitioners Sierra Club, Environmental Defense Fund, Natural Resources Defense Council, Southwest Research and Information Center and Jean Slattery; and the State of Colorado as intervenor. In addition, the State of Wyoming filed an amicus brief.

I

The final product of the milling process for uranium ore is uranium-rich "yellowcake," U_3O_8. The milling process also produces a residue of either slime or coarse sand. This residue, which comprises the uranium mill tailings piles, contains radioactive material, the most significant of which is radium. Radium decays to produce radon. Radon is an inert gas, some of which escapes from the tailings

particles into the atmosphere. Airborne radon degrades into a series of short half-life decay products that are hazardous if inhaled. If the radon gas does not escape the mill tailings piles, its decay products remain in the piles and produce gamma radiation, which may be harmful to people and animals living near the mill tailings piles. Uranium mill tailings also contain potentially dangerous nonradioactive materials such as arsenic and selenium. These toxic and radioactive materials may be ingested with food or water. 48 Fed. Reg. 590, 592 (1983). *See generally* I Environmental Protection Agency, *Final Environmental Impact Statement for Remedial Action Standards for Inactive Uranium Processing Sites* 3-68 (1982) [hereinafter FEIS-IN].

To deal with the perceived dangers presented by uranium mill tailings, Congress enacted the UMTRCA. When it passed this legislation in 1978, it stated, in a section titled "Congressional findings and purposes":

> "uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public, and that the protection of the public health, safety, and welfare . . . require[s] that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings."

42 U.S.C. § 7901(a).

In the UMTRCA, Congress gave the Department of Energy (DOE) and the Nuclear Regulatory Commission (NRC) responsibility for implementing a remedial program to clean up and dispose of the mill tailings. *See id.* §§ 7911-7924. The EPA is responsible for promulgating the general standards that the implementing agencies must meet. *See id.* §§ 2022(a), 7918(a).

The EPA issued proposed general standards for the remedial program in two parts: cleanup standards and disposal standards. The EPA intended the cleanup standards

to reduce the detrimental health consequences of tailings that have been dispersed from the tailings piles or used in construction 45 Fed. Reg. 27,370, 27,370 (1980). The EPA intended that the disposal standards place the tailings piles "in a condition which will be safe for a long time." *Id.*

On April 22, 1980, the EPA Administrator published for comment "Proposed Clearup Standards for Inactive Uranium Processing Sites." 45 Fed. Reg. 27,370 (1980). These proposed standards were "for the cleanup of open lands and buildings contaminated with residual radioactive materials (mainly tailings) from inactive uranium processing sites." *Id.* The EPA made them immediately effective as interim standards pending comment, review, and promulgation of the final standards. The EPA also issued a draft environmental impact statement to support the proposed standards.

The proposed cleanup standards established allowable levels of radium concentration in soil contaminated by dispersed tailings. The standards also set permissible levels of radon decay product concentration and gamma radiation in occupied or occupiable buildings affected by the tailings.[1]

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[1] The proposed standard for soil contamination read:

> "(a) the average concentration of radium-226 attributable to residual radioactive material from any designated processing site in any 5 cm thickness of soils or other materials on open land within 1 foot of the surface, or in any 15 cm thickness below 1 foot, shall not exceed 5 pCi/gm."

45 Fed. Reg. at 27,374. A curie is the amount of radioactive material that produces 37 billion nuclear transformations per second. One picocurie (pCi) = 10^{-12} Ci. *Id.*

The proposed standard for buildings stated that the levels of radioactivity in any occupied or occupiable building shall not exceed, due to residual radioactive materials from any designated processing site, either: (1) 0.015 WL as an average annual indoor radon decay product concentration, including background; or (2) 0.02 milliroentgen/hour of indoor gamma radiation above background. *Id.* at 27,374-75. A WL or working level is "any combination of short-lived radon decay products in one liter of air that will result in the ultimate emission of alpha particles with a total energy of 130 billion electron volts." *Id.* at 27,374.

In addition, these proposed standards contained exceptions to strict compliance if certain criteria were met. *Id.* at 27,375. At qualifying sites, the implementing agency was to perform remedial action that would come as close as possible to meeting the standard to which the exception applied. *Id.*

The EPA issued the second set of proposed standards, the disposal standards, on January 9, 1981. 46 Fed. Reg. 2556 (1981). The disposal standards placed limits on the radon release to the atmosphere from the tailings piles and also placed limits on water contamination from the piles. *Id.* These standards required that the tailings be disposed of in a manner "that provides a reasonable expectation that these limits will be satisfied for at least one thousand years."[2] *Id.*

In the proposed disposal standards the EPA left little doubt that it foresaw covering the tailings piles as the most viable means to achieve the proposed radon emission standards. The EPA stated,

> "In the draft EIS we analyze the health and environmental protection benefits and the costs of several levels of controlling tailings, assuming a variety of potential control methods. We find that radon emission levels of an 'average' pile can be reduced to approximately the levels characteristic of ordinary land by applying a soil cover at costs in a range of about 1 to 14 million (1979) dollars."

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[2]Specifically, the proposed standard for the radon emission limit from the tailings pile read: "(a) The average annual release of radon-222 from a disposal site to the atmosphere by residual radioactive materials will not exceed 2 pCi/m^2 - sec." 46 Fed. Reg. at 2562. A footnote to the standard read:

> "The radon emitted from a tailings site after disposal will come from the tailings and from materials covering them. Radon emissions from the covering materials should be estimated as part of developing a disposal plan for each site. . . . After disposal, the radon emission standard is satisfied if the emission rate is less than or equal to 2 pCi/m^2 - sec plus the emission rate expected from the disposal materials."

Id. at 2559.

One of the standards established limits for concentrations of toxic substances in underground sources of drinking water.[3] Another water standard required that

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[3]This standard provides:

"(b) Substances released from residual radioactive materials after disposal will not cause

(1) The concentration of that substance in any underground source of drinking water to exceed the level specified in Table A, or

(2) An increase in the concentration of that substance in any underground source of drinking water, where the concentration of that substance prior to remedial action exceeds the level specified in Table A for causes other than residual radioactive materials. This subsection shall apply to the dissolved portion of any substance listed in Table A at any distance greater than 1.0 kilometer from a disposal site that is part of an inactive processing site, or greater than 0.1 kilometer if the disposal site is a depository site.

Table A

Milligrams/liter:	
Arsenic	0.05
Barium	1.0
Cadmium	0.01
Chromium	0.05
Lead	0.05
Mercury	0.002
Molybdenum	0.05
Nitrogen (in nitrate)	10.0
Selenium	0.01
Silver	0.05
pCi/liter:	
Combined radium-226 and radium-228	5.0
Gross alpha particle activity (including radium-226 but excluding radon and uranium)	15.0
Uranium	10.0"

46 Fed. Reg. at 2562-63.

substances released from the disposal site "after disposal will not cause the concentration of any harmful dissolved substance in any surface waters to increase above the level that would otherwise prevail." *Id.* at 2562.

The EPA received extensive comments on both the proposed cleanup and disposal standards. *See* II FEIS-IN (summary of comments and responses). The comments were wide ranging—the industry petitioners argued that there was insufficient evidence of risk of harm to warrant the standards, while the environmental groups argued that the proposed standards did not provide adequate protection against the risks posed by the tailings. Both sides buttressed their arguments with technical studies and expert analysis.

Congress in 1982 discussed amendments to the UMTRCA to extend the deadline for the promulgation of final standards and enacted an amendment on January 4, 1983. *See* Act of Jan. 4, 1983, Pub. L. No. 87-415, sec. 18, 96 Stat. 2067, 2077 (1983) (codified at 42 U.S.C. § 2022(a)) (generally referred to as the "1982 amendment"). Anxious to institute standards for the mill tailings, Congress also provided that should the EPA miss the extended deadline, remedial action would commence using the proposed standards. *Id.*; House Conf. Rep. No. 884, 97th Cong., 2d Sess. 44-45, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3592, 3603, 3614-15. By the time Congress passed the amendment its specified deadline for inactive sites had already passed. *See* 42 U.S.C. § 2022(a). Important for our purposes is that Congress also included in the 1982 amendment a sentence explaining the various factors that it required the EPA to consider in developing the standards: "In establishing such standards, the Administrator shall consider the risk to the public health, safety, and the environment, the environmental and economic costs of applying such standards, and such other factors as the Administrator determines to be appropriate." *Id.*

On January 5, 1983, one day after Congress passed the amendment, the EPA promulgated the final "Standards

for Remedial Actions at Inactive Uranium Processing Sites," which covered both cleanup and disposal requirements. 48 Fed. Reg. 590 (1983) (filed Dec. 30, 1982) (codified at 40 C.F.R. §§ 192.00-.43 (1984)). The final regulations differed, in some ways quite substantially, from the proposed standards. In explaining the changes in general terms the EPA said:

> "In response to comments on the proposed standards for disposal and for cleanup, we have evaluated a number of alternatives in terms of their costs and the reductions achievable in potential health effects. A number of changes have been made, including raising some of the numerical limits and eliminating some requirements. The purpose of most of these changes is to make implementation easier and less costly. The changes should not result in any substantial loss of health or environmental protection over that which would have been provided by the proposed standards."

48 Fed. Reg. at 590.

After specifically explaining in a table the various alternatives it had considered for disposal of the mill tailings piles, the EPA divided the alternatives into categories of least cost, optimized cost-benefit, or nondegradation alternatives. *Id.* at 591. To justify the less stringent final disposal standards, the EPA said that the original standards it had proposed were close to nondegradation standards and that they would have been difficult to implement because they required cleanup and control limits close to background levels of radiation. *Id.* It also said that "the small incremental health benefits, when compared to the benefits for less stringent alternatives, do not appear to justify the large additional costs." *Id.* In its final standards, the EPA purported to select an "optimized cost-benefit" rather than a "least cost" alternative. Id. The final standard for control or disposal of the tailings piles set the radon emission limit at 20 pCi/m^2s rather than the

proposed 2 pCi/m^{2}s limit.[4] *Id.* Furthermore, the EPA changed the flat 1000 year disposal longevity requirement, qualifying it with the language, "to the extent reasonably achievable and, in any case, for at least 200 years, ..." 40 C.F.R. § 192.02(a) (1984).

The final regulation set the cleanup standard for land, the maximum concentration level of radium 226, at 5 pCi/gram averaged over the first 15 centimeters of soil and at 15 pCi/gram for soil layers more than 15 centimeters below the surface.[5] This standard was an increase from the 5 pCi/gram level set out in the proposed standard for subsurface soil. 46 Fed. Reg. at 2562. After explaining the differences between the proposed and final regulations for dispersed tailings contaminating the soil, the EPA stated

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[4] "§ 192.02 Standards.

Control shall be designed to:

(a) Be effective for up to one thousand years, to the extent reasonably achievable, and, in any case, for at least 200 years, and,

(b) Provide reasonable assurance that releases of radon-222 from residual radioactive material to the atmosphere will not:

(1) Exceed an average release rate of 20 picocuries per square meter per second, *or*

(2) Increase the annual average concentration of radon-222 in air at or above any location outside the disposal site by more than one-half picocurie per liter."

40 C.F.R. § 192.02 (1984) (footnotes omited) (emphasis in original).

[5] "§ 192.12 Standards

Remedial actions shall be conducted so as to provide reasonable assurance that, *as a result of residual radioactive materials from any designated processing site*:

(a) The concentration of radium-222 in land averaged over any area of 100 square meters shall not exceed the background level by more than—

(1) 5 pCi/g, averaged over the first 15 cm of soil below the surface, and

(2) 15 pCi/g, averaged over 15 cm thick layers of soil more than 15 cm below the surface."

40 C.F.R. § 192.12 (1984) (emphasis in original).

that it believed the final standards "will result in essentially the same degree of cleanup, and will be simpler to implement." 48 Fed. Reg. at 600.

The EPA also adjusted the final standards on the limits for radioactivity in buildings affected by the mill tailings. The EPA increased the maximum permissible level of radon decay product concentration from 0.015 WL to 0.03 WL, requiring, however, that "reasonable effort shall be made to achieve, an annual average (or equivalent) radon decay product concentration (including background) not to exceed 0.02 WL." 40 C.F.R. § 192.12(b) (1) (1984). The level of gamma radiation allowed by the final standards is no more than 20 microroentgens per hour over background level. *Id.* § 192.12(b) (2).

Commenting upon the difficulty of assessing water contamination at the various sites and stating a belief that there was a low probability of additional contamination at most sites, the EPA retreated from its proposed water regulations, stating that it was refusing to enact general regulations on the subject. 48 Fed. Reg. at 599. The EPA, however, did recognize the potential for site-specific water contamination problems. In the cases where there was a potential for ground water contamination, the EPA declared that it had provided:

> "in the implementation section of these standards, that judgments on the possible need for monitoring or remedial actions should be guided by relevant considerations described in EPA's hazardous waste management system, and by relevant State and Federal Water Quality Criteria for existing and anticipated uses of the aquifer."

Id. at 599-600. The EPA adopted the same approach to surface water contamination, leaving the regulatory burden to the DOE and the NRC on a site-specific basis, although it indicated that it thought surface water would be adequately protected in any case by its general disposal standards. *Id.*

The final standards, like the proposed standards, incorporated provisions allowing the implementing agency to grant exceptions if certain criteria were met. See 40 C.F.R. §§ 192.21-.22 (1984).

The industry petitioners, the environmental groups, and the State of Colorado raise the following issues for our consideration: (1) whether the EPA must find that the mill tailings piles present "a significant risk" of harm before promulgating standards under the UMTRCA; (2) whether the EPA's radon emission and radium-in-soil standards are invalid because they are on-site standards beyond the EPA's authority to promulgate; (3) whether the EPA standards unlawfully impose management, design, and engineering requirements; (4) whether the EPA should engage in a cost-benefit analysis in establishing the standards for the final regulations, particularly the radon emission standard; (5) whether the EPA's standards for the mill tailings piles are arbitrary and capricious because they are unsupported by the record and bear no rational relationship to the protection of the public safety and health and the costs required to implement them; and (6) whether by abandoning general water quality standards and standards regarding non-radiological toxic pollutants the EPA has acted contrary to the law.

The UMTRCA refers to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, for standards of judicial review of rules promulgated under it. *See* 42 U.S.C. § 2022(c) (2). The appropriate standard of review for this type of informal, notice and comment rulemaking is that an agency's action may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). The Supreme Court recently has reiterated a restrictive view of the arbitrary and capricious standard, stating:

> "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the rel-

> evant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' . . . In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983) (citations omitted). In addition, as part of our review, we also determine: (1) whether the agency acted within the scope of its authority, and (2) whether the agency complied with the prescribed administrative procedures. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-417 (1971); *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1028 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977); 5 U.S.C. § 706(2)(A) (C) & (D).

II

A preliminary question arises as to what documents we may review in considering these petitions. The EPA, supported by the environmental petitioners, has moved to strike references in the briefs filed by industry petitioners to documents and reports not in the record. Industry petitioners not only allege that those items are proper for our consideration but have moved to supplement the record to include the documents and reports that they cite. A decision on the appropriate use of these materials is important, because, in this case, we are a reviewing body, not an independent decision maker. We do not substitute

our judgment for the judgment of the agency simply because we might have decided matters differently. We agree with the comments in *Deukmejian v. Nuclear Regulatory Commission*, 751 F.2d 1287, 1323-1326 (D.C. Cir. 1984), that the agency's action must be reviewed on the basis articulated by the agency and on the evidence and proceedings before the agency at the time it acted. Aggressive use of extra-record materials also would run directly counter to the admonitions of the Supreme Court in *Motor Vehicle Manufacturers Association.*

Thus, any exception to this general rule against the use of extra-record materials must be extremely limited. Nevertheless, a few courts have found exceptions. A recent law review article discusses the problem that we, and all other appellate courts, face in determining whether and how to use extra-record citations. Stark & Wall, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 Ad. L. Rev. 333, 335 (1984). The article notes that, on review, parties have offered extra-record studies and other evidence under a number of justifications, including: (1) that the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); (2) that the record is deficient because they agency ignored relevant factors it should have considered in making its decision, *see Hiatt Grain & Feed, Inc. v. Bergland*, 446 F.Supp. 457, 467 (D. Kan. 1978), *aff'd on other grounds*, 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); (3) that the agency considered factors that were left out of the formal record, *see Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978); (4) that the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues, *see Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977); and (5) that evidence coming into existence after the agency acted demonstrates that the actions were right or wrong, *see American Petroleum Institute v. EPA*, 540 F.2d 1023, 1034 (10th

Cir. 1976), cert. denied, 430 U.S. 922 (1977). As Stark and Wall observe, when such justifications are offered the court is forced as a practical matter to examine the material, whether or not motions to supplement the record are granted. 36 Ad. L. Rev. at 343-44.

In the instant case one or more of the above justifications are advanced with respect to virtually all extra-record citations. We have in fact considered those materials to see if they fail within any of these possible justifications. But the fact that we examine these materials for the limited purposes set forth above does not mean that the cited items should become a part of the record in these cases. The references to such extra-record items, we believe, are substantially akin to the practice of citation to scientific treatises in ordinary civil cases. Therefore, we deny the EPA's motion to strike the references; but we also deny all motions to supplement the record except the EPA's unopposed motion to supplement the record with a letter of transmittal dated June 8, 1983, from Christopher Herman of the EPA to Larry Boggs, counsel for petitioner American Mining Congress and two accompanying memoranda dated April 27, 1983, and June 7, 1983.

III

The industry petitioners[6] contend that the language and legislative history of the UMTRCA require the EPA to find that the mill tailings piles pose a "significant risk" before the EPA may promulgate regulations dealing with the mill tailings piles. Petitioners rely on *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (hereinafter the *Benzene* case). In the *Benzene* case, Justice Stevens, for the plurality, invalidated OSHA regulations intended to protect workers from the

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[6]In the text of this opinion we refer to American Mining Congress, United Nuclear Corporation, Kerr-McGee Corporation, Kerr-McGee Nuclear Corporation, and Homestake Mining Company as the "industry petitioners." Although we recognize that some of their arguments differ, most do overlap.

carcinogenic effects of benzene. Justice Stevens and three other members of the Court agreed that under §§ 3(8) and 6(b) (5) of the Occupational Safety and Health Act[7], before the Secretary may promulgate any permanent standards for workers' health and safety, he must find that their workplace presents a significant risk of harm. *Id.* at 642. In so concluding, the plurality relied heavily upon the actual language from §§ 3(8) and 6(b) (5). *Id.* 641-42.

We believed that the Benzene case and all the other OSHA cases requiring a threshold finding of significant risk are readily distinguishable from the case at hand. In the UMTRCA Congress commanded the EPA, the NRC, and the DOE to deal with the problems posed by uranium mill tailings:

> "The Congress *finds* that uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public, and that the protection of the public health, safety, and welfare and the regulation of interstate commerce *require* that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of such tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings."

42 U.S.C. § 7901(a) (emphasis added). It would be disingenuous to hold, after reading Congress' own statement of its findings and purposes, that the EPA must make its own determination of whether radon emissions present a risk significant enough to warrant regulation under the UMTRCA. Admittedly, the language "may pose a potential and significant radiation health hazard to the public" might lead one to question whether Congress was resolute on the degree of danger the mill tailings pose. Yet, even if

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[7] 29 U.S.C. §§ 652(8) and 655(b)(5).

Congress was unsure of the absolute risk posed by mill tailings, it was sure of its desire to stabilize and dispose of the tailings and that "every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner . . . ." *Id.*

The legislative history of both the UMTRCA and its 1982 amendment confirm our belief that it is unnecessary for the EPA to make its own determination that the tailings pose a significant risk. The House Report on the UMTRCA stated, "[a]s a result of being for all practical purposes, a perpetual hazard, uranium mill tailings present the major threat of the nuclear fuel cycle." H.R. Rep. No. 1480, Part 1, 95th Cong., 2d Sess. 11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7433, 7433. Thus, Congress considered the mill tailings a hazard, despite evidence brought before it that mill tailings might not pose an immediate danger to current generations. In part two of the same House Report the NRC Chairman, Dr. Joseph M. Hendrie, described how the mill tailings piles present a hazard to the public health:

> "Unlike high-level radioactive waste from the back end of the nuclear fuel cycle, which contains products of the fission reaction, mill tailings contain only naturally occurring radioactive elements, in small quantities. . . .
>
> The health effects of this radon production are tiny as applied to any one generation, but the sum of these exposures can be made large by counting far into the future, large enough in fact to be the dominant radiation exposure from the nuclear fuel cycle."

Id. at 25, 1978 U.S. Code Cong. & Ad. News at 7433, 7452. By including such passages in its report, Congress showed it was clearly aware that the mill tailings themselves did not pose an immediate grave danger to persons in being. Nevertheless, Congress chose to consider protecting future generations by enacting the UMTRCA and

requiring the immediate stabilization and disposal of those tailings.

The 1982 amendments did not change the thrust of the original UMTRCA plan. The changes in the legislation that pertained to the EPA's duties under the UMTRCA, according to the House Conference Report, were not designed to change the EPA's basic regulatory approach. House Conf. Rep. No. 884, supra, at 47, 1982 U.S. Code Cong. & Ad. News at 3592, 3617. Instead, Congress designed the amendments to set out the factors that the EPA should consider in developing the standards. The Conference Report indicated that Congress did not find fault with the EPA's proposed standards.

> "In each instance, the conferees have agreed to include specific references in the appropriate sections of the Atomic Energy Act directing EPA and NRC, in promulgating such standards or regulations, to consider the risk to the public health, safety, and the environment, the environmental and economic costs of such standards of [sic] regulations, and such other factors as EPA or NRC, respectively, determine to be approprite.
>
> . . . The conferees note that this language reflects accurately the current regulatory approach of the agencies. The language agreed to by the conferees should not result in any delays in establishment of remedial action standards. EPA, for example, has already advised the conferees that it is considering costs in formulating its inactive site requirements. . . . Moreover, in adopting the language, the conferees intend neither to divert EPA and NRC from their principal focus on protecting the public health and safety nor to require that the agencies engage in cost-benefit analysis or optimization.
>
> The conferees are of the view that the economic and environmental costs associated with standards and requirements established by the

> agencies should bear a reasonable relationship to the benefits expected to be derived. This recognition is consistent with the accepted approach to establishing radiation protection standards, and reflects the view of the conferees that, in promulgating such general environmental standards and regulations, EPA and NRC should exercise their best independent technical judgment in making such a determination. At all times, the conferees fully intend that EPA and NRC recognize as their paramount responsibility protection of the public health and safety and the environment."

Id.

In this conference report there was no mention of the necessity of finding "significant risk" before promulgating regulations. We believe it would be outside the appropriate bounds of judicial review for us to require a showing of significant risk when Congress has been clear in its approval of the EPA's approach to mill tailing regulation.[8]

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[8]Two discussions, one in the House and one in the Senate, on the conference report may imply that the EPA should make a determination that it must find that radon presents a significant risk. In one, Congressman Lujan stated:

> "In addition, the conferees' action is intended to lay to rest suggestions, such as those made by EPA officials to mill operators in my State, that the preamble to the Mill Tailings Act represents a congressional predetermination that a significant risk exists from radon from mill tailings or that particular forms of remedial action must be taken."

128 Cong. Rec. H8816 (daily ed. Dec. 2, 1982).

In the other, Senator Simpson, the bill's floor manager, discussed the significance of risks with Senator Wallop.

> "Mr. WALLOP: . . . It is my understanding that EPA and NRC have stated that they felt compelled by the Mill Tailings Act to impose stringent requirements, such as a 2-picocurie radon emanation standard, irrespective of costs, because of language in the preamble to the 1978 Mill Tailing Act. From my reading of the

IV

The industry petitioners argue that the EPA's radon "flux" or emission limits and radium-in-soil cleanup stand-

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> applicable provision, the 1978 act directed the agencies to take 'every reasonable effort' necessary to protect public health. Implicit in that language is a direction to exercise reasonable discretion. Have [sic] the amendment dispelled the misapprehension of the agencies on this point?
>
> Mr. SIMPSON: I say . . . that, in my best estimate, they have. The statement of [the] managers clearly states that it is the agreement of the conferees that EPA and NRC, in promulgating standards and regulations, should exercise their best independent technical judgments. The agencies should determine the risks associated will [sic] mill tailings and the significance of those risks. They should also examine various regulatory approaches to deal with significant risks that are identified. Of course, we expect the approach ultimately adopted to be reasonably related to the risks in terms of costs. In short, Congress has not directed any specific regulatory program. On technical issues relating to the regulation of mill tailings, EPA and NRC should both exercise reasonable judgment on the appropriate course to accomplish the basic purpose of the act, which is to protect the public health and safety from unreasonable risks."

128 Cong. Rec. S13,055-56 (daily ed. Oct. 1, 1982).

We recognize the assistance in interpretation that these discussions of the amendments provide. We are constrained, however, by the language of the UMTRCA and the conference report to find that no showing of significant risk is necessary. A colloquy between two House or Senate members cannot change the conference report, it merely is of assistance in interpreting it. *See* Remarks by Congressman Udall, 128 Cong. Rec. H8824 (daily ed. Dec. 2, 1982) (". . . we cannot with a colloquy change the law. We cannot change the conference report. We can indicate what it means and how it is interpreted by Members who served on it."). To hold that the EPA must determine that the tailings piles pose a significant risk before regulating would change the entire structure of the statute.

It is more reasonable to interpret the quoted comments to mean that the EPA must consider the significance of the risk in weighing the costs and benefits of the alternative standards, a subject we discuss in Part VI. We do not believe that Congress intended the UMTRCA to require the EPA to go through a two-phase analysis of: (1) determining

ards exceed the EPA's statutory authorization because they operate inside the mill tailings sites. This argument that the EPA may not adopt standards that operate at the mill tailings sites derives from the 1970 Reorganization Plan which transferred the Atomic Energy Commission (now NRC) authority to set generally applicable environment standards to the EPA. *See generally Quivira Mining Co. v. EPA*, 728 F.2d 477, 480 (10th Cir. 1984) (history of reorganization). That act defined standards to mean "limits on radiation exposures or levels, or concentrations or quantities of radioactive materials, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material." 84 Stat. 2086, 2088 (1970) (codified at 5 U.S.C. App. § 2(a)(6) at 1132-33). The AEC (now NRC) was to retain authority over the licensing of commercial operations using or producing radioactive materials. 5 U.S.C. App. at 1135.

The American Mining Congress argues that this strict distinction between the EPA operating outside site boundaries and the NRC operating on-site has been maintained in the UMTRCA. The reference to "outside the boundaries," however, does not appear in the final version of § 275 of the UMTRCA. 42 U.S.C. § 2022(b). As finally enacted that statute requires the EPA to adopt only "standards of general application," leaving "implementation and enforcement" to the NRC in the conduct of its licensing activities. *Id.* at § 2022(d). The legislative history and administrative interpretations prior to the promulgation of these regulations are less than clear. Yet Congress' concern all along has been the protection of the general public from radiation and other hazards connected with these

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the significance of risk of radon emissions before regulating, and (2) after a significance finding, balancing the costs of the regulations against the benefits (reductions of risks, among other things) of the alternatives. The language of the statute itself and the legislative history of the statute and the amendment are too clear on the need for regulations concerning uranium mill tailings for us to interpret the statute to require a significant risk finding before regulating. Instead, we believe that the alternative that the EPA selects for regulating the piles should reflect the significance of the risk that it believes the piles present.

operations. *See* House Conf. Rep. No. 884, *supra*, at 47, 1982 U.S. Code Cong. & Ad. News at 3617. If one of the principal hazards is inert radon gas that escapes from a pile into the atmosphere and travels some distance, the obvious remedy is to prevent that escape. Such remedy requires measures applicable at the source. We hold that the EPA has not exceeded its statutory authority in adopting this remedy.

V

The American Mining Congress argues that the radon "flux" or emission limits and radium-in-soil cleanup standards limits are invalid because they influence, and to a great extent define, the type of engineering or design standard to be selected by the implementing agency. *See* H.R. Rep. No. 1480, Part 1, *supra*, at 17, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 7439 ("The EPA standards and criteria should not interject any detailed or site-specific requirements for management, technology or engineering methods . . . on the Department of Energy.").

As noted above, Congress sought in the UMTRCA to divide responsibility for disposal and cleanup among the agencies, with the EPA setting standards for general application and the DOE and the NRC implementing those standards. *See* 42 U.S.C. §§ 7911-7925. This division of responsibility and authority, however, should not be read to prevent the EPA from instituting a radon flux or radium limit that could be translated into a covering measurement requirement. As we discuss in the next section, the EPA had to meet a congressional mandate of some sort of cost-benefit analysis in promulgating the regulations. To do so it had to be able to estimate the cost of implementing the regulations. To determine the cost, the EPA had to have an approximate idea of the type of remedial action that will be undertaken; otherwise, its task is impossible. We therefore hold that the EPA did not exceed its authority by enacting emission limitations that appear to correlate directly with covering measurements. Furthermore, because the standards are general in na-

ture—they apply to all sites—we do not view them as site-specific "management, technology or engineering" methods.

VI

All petitioners criticize the EPA's approach in considering costs and benefits in developing the standards. The industry petitioners find fault with what they describe as the EPA's failure to consider costs of disposal and cleanup in comparison with what they perceive as the limited health benefits of the regulation. The environmental petitioners,[1] on the other hand, argue that the EPA should promulgate strict feasibility standards, with a very limited review of the costs of implementing those standards.

The environmental petitioners argue that the UMTRCA requires the EPA to protect the public health to the maximum extent possible, constrained only by technical feasibility, and, to some extent economic feasibility. Feasibility analysis, as the Supreme Court has used that term, places a less severe restraint on agency action intended to forestall environmental harm than cost-benefit analysis. *See American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 507-09 & n.27 (1981). Feasibility analysis and cost-benefit analysis are mutually exclusive approaches. *Id.* at 509. In light of the language of the 1982 amendment to the UMTRCA we must reject the environmental petitioners' argument that control of mill tailings should be as extensive as is capable of being performed. The amendment foreclosed the EPA's use of a feasibility standard in promulgating regulations by requiring the EPA to consider "the environmental and economic costs" of applying the standards. 42 U.S.C. § 2022(a). The legislative

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[1] In the text of this opinion we refer to joint petitioners Sierra Club, Environmental Defense Fund, Natural Resources Defense Council, Southwest Research and Information Center, and Jean Slattery as the "environmental petitioners." The arguments of the State of Colorado as intervenor and the State of Wyoming as amicus generally parallel those of the environmental petitioners.

history also reveals Congress' intent to forgo a feasibility standard. The conference report noted that there should be a reasonable relationship between the environmental and economic costs associated with the standards and the benefits to be derived from them. House Conf. Rep. No. 884, *supra*, at 47, 1982 U.S. Cong. & Ad. News at 3617.[10]

We agree with the industry petitioners that the UMTRCA does require a consideration of costs relative to benefits, a cost-benefit analysis,[11] by requiring a reasonable relationship between costs and benefits. We have no doubt, after reading the UMTRCA and its legislative history, that Congress gave the EPA a clear indication of its intent to require some sort of cost consideration. *See American Textile Manufacturers, Inc.*, 452 U.S. at 510-11.

Nevertheless, although Congress acknowledged a cost-benefit requirement, it did not define what the EPA must do to meet that requirement in promulgating regulations.

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[10]Also, discussing the amendments in the Senate with Senator Schmitt, Senator Simpson rejected feasibility analysis for these regulations:

> Sen. Schmitt: "By requiring a consideration of environmental and economic costs, is my understanding to consider more than just the feasibility of their standards and regulations?
>
> Mr. SIMPSON. The Senator's understanding is correct. The direction to consider costs requires more than a perfunctory determination of whether a given cost can be borne by the uranium industry or a particular licensee."

128 Cong. Rec. S13,055 (daily ed. October 1, 1982).

[11]Senator Simpson indicated that the amendment to the statute did not require an "itemized cost-benefit approach." He stated:

> "As indicated in the statement of managers, standards and requirements must bear a reasonable relationship to the expected benefits; that is, the costs to comply should be commensurate with the risks. This is not to say that an itemized cost-benefit optimization approach is required. In balancing costs and risks to assure a reasonable relationship between the two, judgment must be exercised by the agencies."

128 Cong. Rec. S13,055 (daily ed. Oct. 1, 1982) (colloquy between Sen.Simpson and Sen. Schmitt).

The label "cost-benefit analysis" encompasses everything from a strict mathematical balancing formula to a less strict standard that merely requires the agency to recognize both the costs and benefits of specific proposed alternatives and consider the differences in choosing an appropriate alternative. "Labels are neither important nor determinative." *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1037 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977).

We read the UMTRCA to provide that the EPA must consider the costs involved in the regulations and, with the guidance of Congress' intent, find that these costs bear a reasonable relationship to the benefits derived. *See* House Conf. Rep. No. 884, *supra*, at 47, 1982 U.S. Code Cong. & Ad. News at 3617. The EPA must consider Congress' intent to protect the public health and safety and the environment in its decision, because this intent refines the cost-benefit standard by assigning the values or weights that the EPA must use in its determination of a balance of benefits and costs. *Id.* (Congress considered protection of these things to be "paramount"); *see generally American Petroleum Institute*, 540 F.2d at 1028 ("the guiding star is the intent of Congress . . . . All issues must be viewed in the light of that intent."). The EPA labeled its final standard for control of the tailings piles as an "optimized cost-benefits" alternative. 48 Fed. Reg. at 591. The legislative history of the statute specifically stated that an optimized cost-benefit analysis was not necessary. It also stated that even a cost-benefit analysis was not required.

In the House Conference Report, discussing the 1982 amendment, it states,

> "The language agreed to by the conferees should not result in any delays in establishment of remedial action standards. EPA, for example, has already advised the conferees that it is considering costs in formulating its inactive site requirements. . . . Moreover, in adopting the language, the conferees intend neither to divert

> EPA and NRC from their principal focus on protecting the public health and safety *nor to require that the agencies engage in cost-benefit analysis or optimization.*"

House Conf. Rep. No. 884, supra, at 47, reprinted in 1982 U.S. Code Cong. & Ad. News at 3592, 3617 (emphasis added). The topic sentence of the next paragraph states, however, that "[t]he conferees are of the view that the economic and environmental costs associated with standards and requirements established by the agencies should bear a reasonable relationship to the benefits expected to be derived." *Id.* This language, in the context of the entire legislative history of the 1982 amendments, see infra notes 10 and 11, convinces us that Congress intended cost-benefit analysis, but less strict than an optimized cost-benefit analysis.

VII

We must examine each standard to determine whether the EPA properly considered in its analysis each factor required by Congress. Moreover, we must determine whether the EPA's record supports the EPA's action. *See Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976).

A

The industry petitioners criticize the EPA's change in and justification for: its radon emission standard (allegedly from a risk of lung cancer to a risk of misuse); its linear-nonthreshold calculations of radon risk; and its projected life-savings from the promulgation of the regulations. They also criticize the insubstantial benefits of the regulations, which they say bear no rational relationship to their substantial costs.

We do not believe that misuse is an unreasonable justification for the standard, particularly in light of the fact that misuse of the tailings helped lead to the enactment of the UMTRCA. See H.R. Rep. No. 1480, Part 1, *supra*,

at 11, 1978 U.S. Code Cong. & Ad. News at 7433, 7434.[12] We do not believe that the EPA shifted its justification for the radon standard in a manner that denied any part the opportunity to comment on the alleged newly asserted justification, misuse of tailings. In its description of the proposed standard for "Control of Tailing Piles" the EPA stated: "Many interrelated factors affect the long-term performance of tailings pile disposal methods. They include external natural phenomena, such as earthquakes, floods, windstorms, and glaciers, internal chemical and mechanical processes, and *human activities.*" 46 Fed. Reg. at 2558 (emphasis added). Thus, given the legislative history of the Act and the EPA's own language in the proposed standards, misuse, as a justification for the standards, was sufficiently foreshadowed in the proposed scheme; the parties here were not deprived of notice or an effective opportunity to respond. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); *Beirne v. Secretary of Department of Agriculture*, 645 F.2d 862, 865 (10th Cir. 1981).

This court recognizes the industry concerns over the costs that must be incurred to prevent, using the EPA's calculations, approximately 170 to 240 potential lung cancer deaths per century in the United States from uncontrolled mill tailings from all inactive sites. 48 Fed. Reg. 593; I FEIS-IN at 67. We think there is reasonable authority to support the EPA's method of risk calculation in regard to

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[12]The Report stated:

> "From the early 1940's through the early 1970's there was little official recognition of the hazards presented by these tailings. Federal regulation of the industry was minimal. As a consequence, mill tailings were left at sites, mostly in the Southwest, in an unstabilized and unprotected condition. Some of these tailings were used for construction purposes in the foundations and walls of private and public buildings. There, through the concentrated emission of radon gas, the hazard of the tailings and public exposure increased substantially."

H.R. Rep. No. 1480, Part I, supra, at 11, 1978 U.S. Code Cong. & Ad. News at 7433, 7434.

its potential lung cancer deaths estimate.[13] *See Reserve Mining Co. v. EPA*, 514 F.2d 492, 507 n.20 (8th Cir. 1975) (en banc) ("Indeed, a number of the disputes involve conflicting theories and experimental results, about which it would be judicially presumptuous to offer conclusive findings.").

The industry petitioners also criticize the EPA's "estimate that people living continuously next to some of the piles may have lifetime excess lung cancer risks as high as 4 chances in 100." 48 Fed. Reg. at 593, 598. They criticize these figures on several bases,[14] arguing that: (1) few people, if any, are subjected to this risk; (2) the estimate is unreasonable in its assumption that someone would live continuously near a tailings pile; (3) the radon daughter concentrations to which nearby individuals are allegedly exposed, which the EPA listed in the Final Environmental Impact Statement, do not correlate with the radon concentrations in the study the EPA cites; (4) the EPA based the radon measurements on inadequate sampling data; and (5) the risk measurements include background radiation, not just radon from the tailings piles. We address separately these arguments.

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[13] This estimate is based upon a linear nonthreshold theory of radiation danger. This theory presupposes that a linear extrapolation of high dose radiation data yields an accurate estimate of low-level radiation risk. Many questions this theory of radiation risk. *See Management of Commingled Uranium Mill Tailings: Hearings Before the Subcomm. on Procurement and Military Nuclear Systems of the House Comm. on Armed Services*, 97th Cong., 2d Sess. 176, 186-87 (1982) (comments on proposed EPA standards). Nevertheless, we believe that, in making policy decisions, the EPA may adopt a linear nonthreshold calculation to compute risks from low levels of radiation. *See* McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 Geo. L.J. 729, 733-34 (1979).

[14] The industry petitioners also draw our attention to the fact that uranium tailings sites are a "trivial" source of radon in comparison to natural and agricultural releases. This fact may well be true, but it does not prove that uranium mill tailings sites are not a source of radiation risk that Congress instructed the EPA to address.

The EPA has made a "4 in 100" excess risk of lung cancer calculation for those residing near the inactive sites in its radon risk calculation.[15] This figure defines both the risk created by the inactive mill tailings and the benefit to be derived from instituting the radon emission standard—avoidance of that risk. We believe the evidence in the record reasonably supports this risk estimate figure.

Most of the inactive uranium mill tailing sites are located in rather sparsely populated areas. Congress no doubt was aware of this fact when it enacted the UMTRCA and designated the specific sites to which the regulations would apply.[16] *See* 42 U.S.C. § 7912. There are, however, piles located near cities with sizable local populations, such as Salt Lake City, Utah, and Grand Junction, Colorado. *See* I FEIS-IN at 60, Table 4-3. In addition, as the EPA points out, population distributions may change, as a consequence exposing more people to the dangers of radon. I FEIS-IN at 59 ("Although we have ignored population changes since 1970, a future increase in population at several of the urban sites seems likely."). Therefore, although we may agree with the industry petitioners that few people are currently exposed to radon from the piles, this fact does not necessarily negate the need for regulation, especially in light of Congress' presumed knowledge regard-

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[15]At one point in the text preceding the final regulations, the EPA stated this risk to be about 3 chances in 100. 48 Fed. Reg. at 597. We analyze the risk estimate as 4 chances in 100, however, because that is what the EPA ultimately concluded to be the risk. *Id.* at 593, 598.

[16]The Final Environmental Impact Statement states that:

> "We have estimated local and regional exposure at 6 of the 24 inactive sites (SW81). Although this sample is limited, it includes all important urban sites except Canonsburg, Pa. The remaining piles are in remote areas and collectively have only about one tenth of the local and regional population exposures that these six piles collectively have."

I FEIS-IN at 59.

ing the population density in area surrounding the designated sites.[17]

We also reject industry petitioners' assertion that it is unreasonable that someone would live continuously near a pile. Supposedly rational people in our society continuously expose themselves to risks of greater magnitude than those involved here: workers with nuclear materials, underground coal miners, and many others. Some do it for money, some because they underestimate the risk. Radon emission from these piles will occur for thousands of years unless prevented. Public awareness of the dangers may wane. The industry petitioners' criticism does not undermine the validity of the risk assessment; it only points to the limited number of persons who currently may be subject to the risk.

Industry petitioners are correct that there were some discrepancies between the exposure level estimates used to calculate the risk factor included in the Final Environmental Impact Statement, and the referenced study conducted by consultants Ford, Bacon and Davis Utah, Inc.[18]

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[17] *See* 42 U.S.C. § 7912 (processing site designations).

[18] The EPA readily acknowledged the discrepancy in the figures used in Table 4-5 of the Final Environmental Impact Statement. *See* Letter from Christopher Herman, Brief of American Mining Congress, Addendum F. These discrepancies are as follows:

City	Cited Exposure Level	Recalculated* Exposure Level
Salt Lake City**	0.045 WL	0.04 WL
Grand Junction	0.045 WL	0.04 WL
Durango	0.026 WL	0.02 WL
Rifle***	0.007 WL	0.0085 WL
Gunnison	0.008 WL	0.007 WL

*These exposure levels are in turn used to calculate absolute and relative risk estimates.

**The EPA suggested that this discrepancy resulted from the change in the equilibrium factor from the Draft to the Final Environmental

See Letter from Christopher Herman, Attorney, Air, Noise and Radiation Division, United States Environmental Protection Agency, Brief for American Mining Congress, Addendum F. Although these discrepancies alter the risk estimates, we do not think that the deviation is sufficiently significant to render the EPA's upper limit risk estimate to be unsupported by available data. Precision is desirable, yet these discrepancies do not rise to a level that would require invalidation of an estimate as an arbitrary decision.

Industry petitioners criticize the EPA for calculating risk from figures they allege were derived from inadequate sampling data and data that included background levels of radiation, instead of figures based solely on the radon emitted from the inactive sites. We do not find these flaws fatal to the EPA's conclusions. The sampling data compiled by the researchers for the EPA is adequate to support the EPA's estimates.[19] An estimate of risk may reasonably

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Impact Statement.

***The EPA also conceded that it overstated the distance from the piles to the nearest residents. It used a figure of 0.5 miles when it should have used 0.1 miles.

[19]The American Mining Congress faults the Ford, Bacon study's radon measurements because the figures are based on "a single 24-hour sample." They contend that because of the "variability of outdoor radon levels measurements must be taken over an extended period of time." They indicate that they would approve of forty-eight hour samples taken at three-week intervals over a twelve-month period.

This argument misrepresents the scope of the Ford, Bacon study. It is true that each of the study's radon measurements in all the various locations at each mill tailings site appears to have extended over a twenty-four hour period. *See, e.g.*, Joint Appendix at 36, 39, 54, 77, 136. Yet it is also true that the EPA consultants used numberous sampling locations at each tailings pile site when they conducted these twenty-four hour measurements. *See e.g., id.* at 36, 41 (fifteen locations in Durango); 54, 62 (eight locations in Grand Junction); 77, 83 (twenty-six locations in Salt Lake City); 136 (three locations at Spook site in Converse, Wyoming). Any statistician would appreciate that larger sample sizes yield more reliable data. But at some point a study must compromise perfection because of cost and limited time and resources. Here the consultants extrapolated their data using models that took into account existing information on the topography, weather patterns,

include possible background risk—to exclude it could lead to unrealistic assumptions regarding the dangers that the sites do present.

B

The industry petitioners' arguments against the EPA's radium-in-soil concentration standard, 40 C.F.R. § 192.12(a) (1984), are similar. They say the standards are invalid because (1) the EPA's assumptions about the likelihood of significant exposures from the concentrations do not support the standard; and (2) the EPA's assumptions about the relationship between radium concentrations in the soil and indoor radon exposure and potential health effects are arbitrary.

As the EPA points out, contaminated soil under or near a building contributes significantly to indoor radon. 48 Fed. Reg. at 600. The EPA admits in the FEIS-IN, and the industry petitioners point out, that the actual exposure to radon from contaminated soil may vary from the levels that the EPA assumed. Even considering the possible inaccuracies of the EPA's assumptions, there is nothing in the record or arguments presented to convince us that the EPA acted arbitrarily or capriciously in promulgating this

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and local climate of each site as well as the current location and configuration of tailings and residue at each site. *See, e.g., id.* at 40, 58-59, 79. We think that in these circumstances such a model was acceptable substitute for periodic samples taken over an extended period of time. The American Mining Congress does not question the validity of the data which comprised the model. It only questions the methodology.

We are not scientists; we are generalist judges deciding whether the methods used were reasonable. We have not been presented with any reasons to distrust a twenty-four hour sample but not a forty-eight hour sample. Given the other information in the consultants' study about variations in radon release at different hours of the day, *see, e.g., id.* at 39, a cycle covering an entire day and night does not seem arbitrary. Likewise, given information that climate and weather patterns may affect radon release, a model that takes into account variations over an entire year at the particular site seems quite reasonable.

standard to deal with a significant danger the tailings piles present.

The State of Colorado claims that the EPA provided inadequate notice and opportunity for comment on the one hundred square meter sample area for the radium concentration standard. Although this sort of area designation admittedly could influence the effectiveness of the standard, it is not the sort of change that necessitates a new round of comment.

C

In its final standard the EPA increased the allowable level of indoor radon concentration from 0.015 WL to a maximum level of 0.03 WL, stressing that reasonable effort should be made to achieve a radon concentration level of 0.02 WL. *See* 40 C.F.R. § 192.12(b)(1) (1984). The EPA justified this change on the basis that it would ease implementation of the final standard. *See* 48 Fed. Reg. at 600. It further stated that "the final standard deals adequately with complications introduced by the presence of any high concentration of naturally-occurring radionuclides, and avoids unnecessary and costly remedial actions that produce only marginal improvements."[20] *Id.*

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[20]In a claim related to this indoor radon concentration standard, the State of Colorado asserts that the EPA exceeded its authority to set standards of general application and usurped the authority of the states and implementing agencies by allowing the use of sealants, filtration and ventilation devices to provide reasonable assurance of reductions from 0.03 WL to below 0.02 WL. *See* 40 C.F.R. § 192.20(b)(3) (1984). The regulation provides that:

> "Residual radioactive materials should be removed from buildings exceeding 0.03 WL so that future replacement buildings will not pose a hazard [unless removal is not practical--see § 192.21(c)]. However, sealants, filtration, and ventilation devices *may provide reasonable* assurance of reductions from 0.03 WL to below 0.02 WL."

40 C.F.R. § 192.20(b)(3) (1984) (emphasis added). We do not read this language as compelling any particular action; instead we read it as suggesting possible alternatives to reduce radon concentration levels.

The environmental petitioners criticize the final standard for allowing an unjustified increase in risk, represented by the changes from the proposed to the final standard. The proposed standard of 0.015 WL had an estimated residual risk of lung cancer of 0.8 in 100. I FEIS-IN at 108, Table 7-1. The "reasonable effort" level of the final standard, 0.02 WL, had an estimated residual risk of lung cancer of 1.3 in 100. *Id.* Contrary to the environmental petitioners' argument, the EPA did evaluate the residual risk of lung cancer of the ceiling level of radon decay product, 0.03 WL including background, by considering a range of levels between 0.0 WL above background and 0.05 WL above background. *Id.* The FEIS-IN shows a residual risk of lung cancer of 5 in 100, which appears to be the top side risk at 0.05 WL above background. Although this is a significant increase in the risk, we cannot say the EPA acted arbitrarily or capriciously or beyond its authority in allowing the higher level and its attendant risk.

D

Accepting the EPA's risk calculation estimates and thus its conclusion that the control of the tailings piles will reduce health risks and provide benefits Congress desired, we must now determine whether there existed a reasonable relationship between the estimated benefits of control of the tailings piles and the costs of providing those benefits. We start with the obvious premise that there can be no reasonable relationship in the abstract. As we indicate earlier, Congress' intent serves to define the reasonableness of any relationship between costs and benefits. Given Congress' admonition that the EPA recognize as its "paramount responsibility protection of the public health and safety and the environment," House Conf. Rep. No. 884, *supra*, at 47, 1982 U.S. Code Cong. & Ad. News at 3592, 3617, we review the EPA's adoption of the 20 pCi/m^2/sec radon emission standard.

In the Final Environmental Impact Statement the EPA analyzed the "Benefits Derived From Controlling Uranium Mill Tailings Piles," specifically considering the benefits

that would be provided under various remedial alternatives—ranging from "No Standards" to the EPA's originally "Proposed Standard." *See* I FEIS-IN at 99, Table 6-6. The benefits enumerated were: the probable reduction or elimination of human misuse of the tailings after control; the permanence of the controls inhibiting misuse and erosional spreading; the reduction in vulnerability of the site to flooding; the reduction in the residual risk of lung cancer; the deaths avoided; and the surface water protection provided. The alternative the EPA ultimately selected in the final regulations, a 20 $pCi/m^2/sec$ standard,[21] provides significant benefits, meeting Congress' concern that the standard protect the public health, safety, and environment. The selected standard and its corresponding control method,[22] *see* I FEIS-IN at 91, according to the Final Environmental Impact Statement, will most likely prevent misuse of the tailings for over a thousand years, prevent erosional spreading for many thousands of years, leave no sites vulnerable to flooding, reduce residual risk of lung cancer by over 95%, avoid 190 deaths in the first 100 years of protection, and protect surface water from contamination for many thousands of years. I FEIS-IN at 99, Table 6-6.

The environmental petitioners criticize the validity of the final radon emission standard for not "preventing or minimizing" diffusion of radon into the atmosphere. *See* 42 U.S.C. § 7901(a) & (b)(1). In the same vein, they also criticize the tenfold increase in the level of emissions permitted by the final standard, an increase from 2 pCi/m^2s to 20 pCi/m^2s. Despite this significant increase, we believe that the EPA, through its final radon standard, has sought to prevent or minimize radon emission, thus meeting the Congress' mandate. *See* I FEIS-IN at 99, Table 6-6, at

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[21] *See* I FEIS-IN at 128-29 (Alternative B selected).

[22] EPA's selected alternative correlates to a three meter earth cover requirement. I FEIS-IN at 91, Table 6-2. In addition Alternative B assumes three of the piles will be moved for flood control reasons. *See id.* at 91; B-16.

101. Given the reduction in risk provided by the final standard, we do not believe that the "tenfold increase"in the level of emission allowed by the final standard makes that standard unreasonable, even in light of the change. We hold that the final standard is within a zone of reasonableness, *see Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 525, and a logical outgrowth of the proposed standard, *id.* at 547.

All of the petitioners find fault with the EPA's suggested longevity requirement for the final radon emission standard—that the standard control emissions to the extent reasonably achievable, have an effective life of 1000 years, and in any case, for at least 200 years. 40 C.F.R. § 192.02(a) (1984). The industry petitioners consider the thousand-year longevity goal unrealistic. The environmental petitioners consider the reduced two hundred-year minimum inadequate, especially in light of the thousand-year proposed standard. We cannot say the final standard fails to accomplish Congress' goal of long-term stabilization in view of Congress' command to take costs into consideration. The final standard meets Congress' desire to avoid the health risks presented by the tailings piles and provide a remedial program that will result in long-term stabilization of the piles.

Congress stressed that the "remedial action must be done right the first time." H.R. Rep. No. 1480, *supra*, at 40, 1978 U.S. Code Cong. & Ad. News at 7433, 7467. Given Congress' expressed desire to have a remedial program that will stabilize the tailings piles and additionally, not require continuous allocations of funds, *id.*, we believe the EPA acted reasonably in promulgating a standard based primarily upon the adoption of a passive measure, an earth covering. The industry petitioners particularly are critical of EPA's refusal to consider remedial measures that are more dependent upon active controls such as "maintenance" and "monitoring" by the implementing agencies. The EPA did consider such an alternative. I FEIS-IN at 102, Alternative E. But it rejected that alternative upon review of the benefits it would provide. *Id.*

at 98-104, 128-29. Arguably, EPA could have placed more reliance upon the maintenance and monitoring activities of the implementing agencies. Congress, however, did not require it to do so and instead indicated its preference for a more permanent remedial program. The EPA's understanding of its duty under the statute to rely principally upon passive control is sufficiently rational to withstand our review. *See Chemical Manufacturers Association v. National Resources Defense Council, Inc.*, 53 U.S.L.W. 4193, 4196 (U.S. Feb. 27, 1985).

EPA's cost estimates for remedial action at the mill sites and for off-site cleanup were 158 and 38 million (1981) dollars, respectively. EPA stated that the DOE had estimated its additional costs for program development and management ("overhead") at 118 million (1981) dollars. The total estimated expenditure was 314 million (1981) dollars. These figures include both cleanup (off-site) and disposal (on-site) costs. 48 Fed. Reg. at 596. We recognize the tremendous costs that this cleanup program represents. Nevertheless, we cannot condemn as arbitrary the EPA's determination that these costs bear a reasonable relationship to the benefits to be provided. In fact, in enacting the UMTRCA Congress was well aware of the potential costs of the program. Assessing the economic impact of the legislation in 1978, the House Report stated:

> "This legislation is not expected to have any significant inflationary impact. Over the next 7 years, 22 tailing sites will be treated at a total cost ranging anywhere from $15 million to $200 million, depending largely upon whether tailings will be treated and stored at their present location or, instead, moved to newly prepared disposal sites. Little of this cost is expected to be incurred during the next 3 years because of the time required to identify and prepare disposal sites. Additional costs may be borne by individual states if new disposal sites are required. But even taking these additional costs into account, the impact of the legislation on inflation and overly

> [sic] economic performance is expected to be immeasurable [sic]."

H.R. Rep. No. 1480, *supra*, at 47, 1978 U.S. Code Cong. & Ad. News at 7433, 7474. We must defer to the EPA's finding of a reasonable relationship between the costs and the benefits of the remedial action program for disposal of the mill tailings at the inactive sites. As we have said before in another context, "[w]e are convinced that EPA made a serious, careful, and comprehensive study of the costs which compliance will impose . . . . If Congress believes that the cost is too high, it can amend the Act. All we say is that EPA has complied with the statutory mandate." *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1038 (10th Cir. 1976), cert. denied, 430 U.S. 922 (1977).

VIII

There is one area in which we agree with some of the petitioners or the intervenor that the EPA standards are not in compliance with the law or are inadequate and require remand.

In its final standards the EPA abandoned its proposed general standards for limits of concentrations of toxic substances in surface and ground water.[23] *See* 48 Fed. Reg. at 591, 594; *see also* 46 Fed. Reg. at 2562 (text of proposed standards). The EPA concluded that potential contamination of surface and ground water should be dealt with on a site-specific basis. 40 C.F.R. § 192.20(a)(2)(1984); *see also* 48 Fed. Reg. at 594 (discussion of final rules). In place of the proposed standard for control of waterborne pollutants the EPA included a guideline, stating that the DOE should assess each site individually and establish any corrective or preventive programs necessary to meet relevant state and federal water quality standards. 48 Fed. Reg. 591. It stated that those programs should be consistent, to the maximum extent practicable, with the Solid

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[23] *See supra* note 3.

Waste Disposal Act (SWDA), 42 U.S.C. §§ 6901-6986. 48 Fed. Reg. at 591; 40 C.F.R. § 192.20(a)(2) & (3) (1984).

We agree with the environmental petitioners and the State of Colorado that by its actions the EPA violated its duty under the statute. In its proposed regulations the EPA stated that there was a problem with water contamination: "There is evidence of limited ground water contamination at some of the inactive sites, but the prospects for long-term contamination have not been fully assessed." 46 Fed. Reg. at 2560. It then proposed specific standards for water quality generally. *Id.* at 2559-63. In the final regulations the EPA acknowledges there are problems, 48 Fed. Reg. at 593, but states: "We do not believe that the existing evidence indicates that ground water contamination from inactive mill tailings is or will be a matter of regulatory concern." *Id.* at 599. We do not believe that the EPA, in issuing the final regulations, declared that it was wrong before; indeed, by stating that potential contamination should be dealt with on a site specific basis, *id.* at 594, it acknowledged that problems exist at some sites.

The draft Environmental Impact Statement gave little indication of the possibility that the EPA would reject the proposed water standards and adopt a "guidance" outline for the implementing agencies, abandoning any attempt at specific numerical limits of toxic elements. The only statement we could find in the draft EIS that could be construed to indicate consideration of an alternative similar to that adopted is this: "The proposed ground water protection standards could be considered too strict if implementing them would be unreasonable costly or if they would be impossible to apply." Environmental Protection Agency, *Draft Environmental Impact Statement for Remedial Action Standards for Inactive Uranium Processing Sites* 8-8 (1980). The explanation of the proposed water quality standard anticipated possible increases in disposal costs to insure against future ground water contamination, but gave no indication that this possibility would make the proposed standards infeasible. 46 Fed. Reg. at 2560. Many

of the comments submitted to the EPA during the comment period after publication of the proposed rules suggested that the EPA abandon its proposed ground water standards. *See, e.g.*, II FEIS-IN at D-36, -37, -44, -45, -46. But regardless of the tenor of some of the comments, the final "guidance" standard does not represent a logical outgrowth from the proposed regulations.

In our view when the EPA acknowledged that ground water contamination is a problem at some of the inactive sites, it was required to adopt general standards.[24] The UMTRCA provides that the EPA "promulgate standards of general application." 42 U.S.C. § 2022(a). The EPA was not to adopt "site-specific requirements." H.R. Rep. No. 1480, Part I, *supra*, at 16-17, *reprinted in* 1978 U.S. Code Cong. and Ad. News at 7433, 7439. By directing the DOE to follow "relevant" state and federal quality standards consistent "to the maximum extent practicable" with the SWDA, *see* 48 Fed. Reg. at 591; 40 C.F.R. § 192.20(a)(2) and (3) (1984), the EPA was unlawfully delegating to the states or to the DOE its own rulemaking authority or was itself establishing standards that could vary from site to site.

We do not agree, however, with Colorado's argument that an unlawful delegation is involved by the provision of the regulations allowing exceptions from the standards in particular circumstances—permitting the implementing agencies, the NRC and the DOE, to "select and perform remedial actions that come as close to meeting the otherwise applicable standard as is reasonable under the circumstances." 40 C.F.R. § 192.22(a) (1984). So long as general standards are in place, permitting exceptions for special circumstances in which costs might be outrageous or compliance impossible is not an abrogation of the duty to promulgate general standards. A court could determine,

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[24] Of course, a site with no contamination problems would automatically meet any general requirements the EPA might set without further corrective action.

if required to do so, the reasonableness of an exception granted in a specific case.

The environmental petitioners also complain that the EPA has a duty to formulate general standards for nonradiological hazards, toxic chemicals in the uranium tailings, *see* 42 U.S.C. § 2022(a), but has not specifically addressed the subject except in conclusory form:

> "We have reviewed the available data on toxic elements in tailings and improved the FEIS-IN in this respect [Appendix C]. We have concluded that it is reasonable to expect that hazards from toxic elements will be adequately limited if control and cleanup are carried out according to these final standards."

48 Fed. Reg. at 597. We are satisfied that the EPA's general regulations on radon emissions, requiring control of the movement of and probable covering of the tailings adequately deal with the nonradiological hazards of the toxic chemicals, except as they may enter waterways or underground water supplies. If there is a possibility that toxic chemicals will enter underground water supplies or waterways, the statute mandates that the problem be dealt with by general standards. On remand, the EPA will have to treat these toxic chemicals that pose a ground water risk as it did in the active mill site regulations.

IX

We reject all challenges to the regulations except as discussed in Part VIII above. The following regulation, concerning water contamination is set aside: 40 C.F.R. § 192.20(a)(2)-(3) (1984). The case is remanded to the agency for further consideration of that specific provision.

UNITED STATES COURT OF APPEALS
THE TENTH CIRCUIT

Nos. 83-2226
83-2227
83-2277
83-2504
83-2524
84-1349
84-1352
84-1482

AMERICAN MINING CONGRESS, UNITED NUCLEAR CORPORATION, HOMESTAKE MINING COMPANY, AMAX, INC., SOLAR LOBBY, THE ENVIRONMENTAL DEFENSE FUND, INC., NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, AL MANGAN, CHAUNCEY KEPFORD and JUDITH H. JOHNSRUD,
Petitioners,

v.

LEE M. THOMAS, in his capacity as Administrator of the United States Environmental Protection Agency, and ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

STATE OF COLORADO, *et al.*,
Intervenors.

FILED

September 3, 1985

Petitions for Review of an Order of the Environmental Protection Agency

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No. 84-1908

UNITED NUCLEAR CORPORATION, HOMESTAKE MINING COMPANY, and QUIVIRA MINING COMPANY,
Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LEE M. THOMAS, and UNITED STATES NUCLEAR REGULATORY COMMISSION,
Defendants-Appellees.

Appeal from the United States District Court for the District of New Mexico (D.C. CIV No. 83-1602 HB)

Anthony J. Thompson (Edward A. McCabe, Charles E. Sliter, Robert F. Reklaitis and Edward S. Shipper, Jr., also of Hamel & Park, Washington, D.C.; of counsel Larry A. Boggs, Senior Counsel, American Mining Congress, Washington, D.C., with him on the briefs) for the American Mining Congress.

Peter J. Nickles (Richard A. Meserve, also of Covington & Burling, Washington, D.C.; G. Stanley Crout, Sunny J. Nixon, Michael S. Yesley, and Rebecca Dempsey of Stephenson, Carpenter, Crout & Olmsted, Santa Fe, New Mexico, with him on the briefs), for United Nuclear Corporation, Homestake Mining Company, and Quivira Mining Company.

Robert E. Yuhnke, Regional Counsel (James B. Martin, Staff Attorney, also of the Environmental Defense Fund, Boulder, Colorado; Roger Beers and Kathryn Burkett Dixon of Beers & Dixon, San Francisco, California; and Frances M. Green, Staff Counsel, National Wildlife Federation, Boulder Colorado, with him on the briefs) for the Environmental Defense Fund, the National Wildlife Federation, the Sierra Club and Al Mangan.

Barry S. Neuman, Attorney (F. Henry Habicht, II, Assistant Attorney General, Land and Natural Resources Di-

vision, Margaret N. Strand, Martin W. Matzen and John A. Bryson, Attorneys, Environmental Defense Section, U.S. Department of Justice, Washington, D.C.; of counsel A. James Barnes, General Counsel, Gerald Yamada, Acting General Counsel, William F. Pedersen, Associate General Counsel, Charles S. Carter, Assistant General Counsel, and Christopher C. Herman, Office of General Counsel, Environmental Protection Agency, Washington, D.C., with him on the briefs) for Respondents.

Adonis A. Neblett, Assistant Attorney General (Duane Woodard, Attorney General, Charles B. Howe, Deputy Attorney General, and Richard H. Forman, Solicitor General, Denver, Colorado, with him on the briefs) for Intervenor State of Colorado.

Chauncey Kepford and Judith Johnsrud, State College, Pennsylvania, filed briefs as pro se petitioners.

Richard O. Austermann, Senior Counsel Regulatory Affairs, Amax, Inc., Golden, Colorado, filed briefs for Petitioner Amax, Inc.

Before LOGAN and McWILLIAMS, Circuit Judges, and BOHANON, District Judge.*

LOGAN, Circuit Judge.

*Honorable Luther L. Bohanon, United States District Judge for the District of Oklahoma, sitting by designation.

I

These consolidated cases involve challenges to the Environmental Protection Agency's (EPA) standards governing stabilization and control of byproduct materials, primarily mill tailings, at licensed commercial uranium and thorium processing sites (the active mill sites). The EPA established these standards pursuant to its authority under the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), as amended, 42 U.S.C. §§ 2022 and 7901-7942, the same statute that required the EPA to promulgate standards applicable to the inactive mill sites. With the

exception of No. 84-1908, jurisdiction in this court is based upon 42 U.S.C. § 2022(c)(2). No. 84-1908 arises out of a district court action in which plaintiffs asserted that the active mill site regulations were promulgated outside the time limits prescribed by the UMTRCA. The district court dismissed the suit on the ground that the exclusive method of review was by petition in the court of appeals under 42 U.S.C. § 2022(c)(2); plaintiffs have appealed that dismissal although they are raising the identical issue regarding timeliness of promulgation under their concurrent petition filed under § 2022(c)(2).

As in the inactive mill site challenges, *see American Mining Congress v. Thomas*, 772 F.2d 617 (10th Cir. 1985) [hereinafter *Inactive Sites Case*], petitioners may be divided essentially into two categories: (1) the industry petitioners -- the American Mining Congress, a trade association; and joint petitioners United Nuclear Corporation (and its subsidiary Quivira Mining Company) and Homestake Mining Company; and (2) the "environmental" petitioners—The Environmental Defense Fund, the National Wildlife Federation, the Sierra Club, the Solar Lobby, Al Mangan, Chauncey Kepford, and Judith Johnsrud. Intervenor, the State of Colorado, aligns itself on most issues with the environmental petitioners. AMAX, Inc. aligns itself with the industry petitioners although it is challenging only the inclusion of molybdenum as a constituent of the nonradiological hazards designated in the ground water portion of the regulations.

The substance to be controlled and the UMTRCA's legislative background have been discussed briefly in the companion case filed this day involving regulations for inactive mill sites. The relevant hazards addressed by the UMTRCA and its legislative history are the same for the active and inactive site regulations, so we need not repeat that discussion here. *See Inactive Sites Case*, 772 F.2d 621 at (part I).

Congress, apparently angered by the EPA's inaction, imposed time limits upon the EPA's authority to formulate

regulations to govern the active mill sites. A 1983 amendment to the UMTRCA provided, "If the Administrator fails to promulgate standards in final form under this subsection by October 1, 1983, the authority of the Administrator to promulgate such standards shall terminate" in favor of the Nuclear Regulatory Commission. 42 U.S.C. § 2022(b)(1). The EPA published proposed standards for the active mill sites in the Federal RegisTer on April 29, 1983. 48 Fed. Reg. 19,584 (1983). The Administrator signed final standards on September 30, 1983, and apparently released copies to the public on that day. The regulations did not appear in the Federal Register, however, until October 7, 1983. 48 Fed. Reg. 45,926 (1983) (codified at 40 C.F.R. § 192.30-.43 (1984)).

The EPA's final standards, except those for ground water were essentially identical to those adopted for the inactive mill sites. Standards to be applied after the site closure period were to assure control of radiological hazards "for one thousand years, to the extent reasonably achievable, and, in any case, for at least two hundred years . . . ." 40 C.F.R. § 192.32(b)(1)(i) (1984). The final standards also established radon emission limits not to exceed an average release rate of 20 picocuries per square meter per second (pCi/m2s). *Id.* § 192.32(b)(1)(ii). On-site land that meets the described standard is not subject to the disposal standards elsewhere in the regulations. That described standard, based on the maximum concentration level of radium-226 averaged over areas of 100 square meters, is the same as that at the inactive mill sites: 5 picocuries per gram (pCi/g) averaged over the first 15 centimeters of soil and 15 pCi/g for soil layers more than 15 centimeters below the surface. *Id.* § 192.32(b)(2).

The EPA ground water standards for the active mill sites are in two parts: (1) a primary standard applicable to new waste storage areas, including lateral expansions of existing tailings piles, and (2) a secondary ground water protection standard applicable to both old and new piles. *Id.* § 192.32(a)(1)-(2). In almost all circumstances the primary standard would require a liner under new impound-

ments and lateral extensions capable of preventing migration of waste into the ground and water. *See* 48 Fed. Reg. at 45,940-41 (discussion of § 192.32(a)(1)-(2) requirements). Liners were not required for existing impoundments, even though new waste could be added. *See id.* at 45,931 (discussion of § 192.32(a)(2) requirements). The secondary standard in effect requires that the ground water be protected by reducing the level of toxic materials in the ground water to concentration limits permitted by the Solid Waste Disposal Act (SWDA), 42 U.S.C. §§ 6901-6986. The regulations necessitate monitoring programs. 40 C.F.R. § 192.32(a)(2) (1984). One SWDA requirement of impermeable cover material was altered in the final regulations to permit permeable cover in arid areas where evaporation exceeds precipitation. *Id.* § 192.32(a)(1); *see* 48 Fed. Reg. at 45,940 (discussion of basis for alteration). The standards permit exceptions, with the consent of the EPA, for particular existing piles that cannot meet those standards except at extraordinary cost. 40 C.F.R. § 192.32(a)(2) (iv); *see* 48 Fed. Reg. at 45,941 (discussion of potential exceptions). The standards add molybdenum and uranium to the list of hazardous ground water constituents. 40 C.F.R. § 192.32(a)(2)(i).

For purposes of discussion and analysis we divide the petitioners' contentions into four categories: (1) the allegations that the EPA acted beyond its authority because it did not promulgate the regulations within the time requirements of the statute; (2) those arguments sufficiently common to challenges to both the inactive and active mill site regulations that they may be answered, at least in part, by reference to the companion *Inactive Sites Case;* (3) the challenges to the ground water regulations; and (4) AMAX, Inc.'s objection to the addition of molybdenum as a constituent of hazardous material in the ground water regulations.

II

Petitioners United Nuclear Corporation, Homestake Mining Company, and Quivira Mining Company (herein-

after United Nuclear) assert that the EPA exceeded its jurisdiction authority because it promulgated these regulations after the statutory deadline. In early 1983 Congress passed an amendment to 42 U.S.C. § 2022(b)(1), which provides as follows:

> "If the Administrator [of the EPA] fails to promulgate standards in final form under this subsection by October 1, 1983, the authority of the Administrator to promulgate such standards shall terminate, and the [Nuclear Regulatory] Commission may take actions under this chapter without regard to any provision of this chapter requiring such actions to comply with, or be taken in accordance with, standards promulgated by the Administrator."

It is apparently undisputed that the Administrator signed the final regulations on September 30, 1983, and made them available to the public on that day. In the preamble to the regulations the EPA stated, "This standard is promulgated on the date signed." 48 Fed. Reg. at 45,946. The agency filed the regulations with the Office of the Federal Register on October 6; they appeared in the Federal Register on October 7, 1983.

The federal district court for the District of New Mexico dismissed a challenge to the regulations' timeliness, holding that judicial review of the rules was vested exclusively in the appropriate court of appeals pursuant to 42 U.S.C. § 2022(c)(2). We have consolidated the plaintiffs' appeal of that ruling with the various petitions for review of the regulations in the proceeding before us. We agree with the district court that all challenges to rulemaking action of the agency, including assertions that the agency acted in excess of its statutory authority or beyond its jurisdiction, should be initiated in the court of appeals. *See FCC v. ITT World Communications, Inc.*, 52 U.S.L.W. 4507, 4509 (U.S. April 30, 1984). The Administrative Procedure Act authorizes this reviewing court to set aside agency action that is "in excess of statutory jurisdiction, authority or limitation." 5 U.S.C. § 706(2) (C).

Courts considering the statutory periods of limitations for petitions for judicial review of administrative rulemaking, which commonly refer to the date of "promulgation" of rules, *e.g.*, 42 U.S.C. § 2022(c), have held that review petitions are timely if filed within a designated period after publication in the Federal Register. *See Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 812 (D.C. Cir. 1983); *Laminators Safety Glass Ass'n v. CPSC*, 578 F.2d 406, 408 (D.C. Cir. 1978). Relying principally upon these cases, United Nuclear argues for a uniform interpretation of the word "promulgate" as meaning publication in the Federal Register. Under that interpretation the EPA acted too late and thus beyond its statutory authority.

We agree with those decisions that measure the limitations period for seeking judicial review as beginning on the date of publication in the Federal Register. No doubt many parties affected by a rule first learn of its upon publication in the Federal Register. We believe, however, that "promulgation" does not have a single accepted meaning in all contexts. We agree with the EPA that the purpose of the statutory provision was to compel action by the EPA before October 1, 1983. *See* House Conf. Rep. No. 884, 97th Cong., 2d Sess. 43-45, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3592, 3603, 3613-15. In establishing the deadline discussed here, Congress was actually extending deadlines that the EPA had missed in 1979 and 1980. *See id.* The EPA represents, and the other petitioners do not dispute, that the Administrator signed the rules on September 30, 1983, and released them to the public on that same day. At least one meaning of promulgate is to make public; the EPA's action here effectively achieved that end. We do not think Congress intended to throw away the fruits of EPA's labor simply because it did not *publish* the rule before the end of September. We hold that the EPA met Congress's deadline requirement.

III

Most of the arguments by the various petitioners are substantially identical to those in the consolidated *Inactive Sites Case* decided this day.[1] On the basis of the analysis in that opinion, we again hold:

(a) that a finding by the EPA of a "significant risk" is not a prerequisite to promulgating the regulations (see Inactive Sites Cases, 772 F.2d 627 at [part III]);

(b) that the EPA may promulgate standards to apply within the boundaries of the mill sites (*see id.* at 629 [part IV]);

(c) that the EPA's standards do not unlawfully impose management, design, and engineering requirements (*see id.* at 630 [part V]); and

(d) that the EPA properly considered cost-benefit factors in establishing standards (*see id.* at 630 [part VI]).

Most of the various petitioners' arguments that the EPA's standards for radon emission and radium in the soil are arbitrary and capricious are also sufficiently discussed in the opinion on the inactive site regulations. We need not elaborate on or repeat that discussion here. Some of the figures with which we must deal are different, however, and a few arguments have changed somewhat between the two sets of cases.

In formulating the active site regulations the EPA estimated more potential lung cancer deaths from the active mill site tailings, absent regulation, than from the inactive mill site tailings: 500 deaths versus 170-240 deaths per century. *See* 48 Fed. Reg. at 45,929 (active sites); *id.* at

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[1] Some environmental petitioners challenge the EPA's failure to promulgate any regulations controlling radon emissions from the uranium processing itself, as opposed to the end product tailings. This issue was not briefed and is not discussed herein. It has been held in abeyance by court orders requested by the parties pending negotiations between parties.

593 (inactive sites). Although its final regulations for the active sites repeated the 4 in 100 lifetime cancer risk for occupants of houses on tailings in Grand Junction, Colorado—the figure it used in its inactive site calculations—the EPA estimates a 2 in 100 lifetime risk for people living continuously next to "some tailing sites." *Id.* at 45,929. The EPA estimated the cost of active site cleanup at $260 million (1983 dollars) for tailings existing today at licensed sites, but a total of $310 million to $540 million total cleanup cost to the uranium milling industry for all tailings now in existence and to be produced through the year 2000. *Id.* at 45,945. For the standard selected for radon emissions, 20 pCi/m^{2}s, the range of incremental costs per death avoided is estimated from $130,000 (nationwide for 1000 years) to $2.5 million (regionally for 100 years). *Id.* at 45,944-45. *See generally Regulatory Impact Analysis of Final Environmental Standards for Uranium Mill Tailings at Active Sites* 4-1 to 5-39 (detailed EPA costs and benefit discussion). These are significant costs, if the EPA's figures are accurate. But we remain convinced that Congress placed the responsibility for evaluating them upon the EPA without imposing a specific cost-benefit requirement. *See Inactive Sites Case* 772 F.2d at 630 [part VI]. Therefore, the industry petitioners' arguments that the costs are too high for the benefits gained, and the environmental petitioners' arguments that the industry should be forced to incur the greater costs of standards that would save even more lives, should be addressed to Congress or to the EPA, not to this court. *See American Petroleum Institute v. EPA*, 540 F.2d 1023, 1038 (10th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977). The EPA has considered and responded to both of these complaints in justifying its actions. *See* 48 Fed. Reg. at 45,933; *see also* II Environmental Protection Agency, *Final Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Ore Processing* A.3-12 to -14 (1983) hereinafter FEIS-AC.

In arguing that the EPA acted arbitrarily and capriciously the American Mining Congress relies upon a 1984

report by a subcommittee of the EPA's Scientific Advisory Board which stated that the EPA "has not assembled and presented a risk assessment that provides a clear and adequate statement of the scientific basis for developing standards to regulate airborne radionuclide emissions." Subcommittee on Risk Assessment for Radionuclides, Scientific Advisory Board, U.S. Environmental Protection Agency, *Report on the Scientific Basis of EPA's Proposed National Emission Standards for Hazardous Air Pollutants for Radionuclides* 34 (1984). The EPA objects to our consideration of this report because it was not in existence at the time the EPA issued its final regulations.[2] Also, the EPA points out that this report addressed the agency's proposed standards in a separate rulemaking proceeding under the Clean Air Act, that it was not based upon a review of the agency's record before us, and that the Scientific Advisory Board criticisms were aimed generally at the manner in which the EPA assembled the information for decision-making rather then being critical of the background documents themselves. We do not believe that report requires overturning the instant regulations. The report itself acknowledges that scientists may differ in regulatory philosophy, adopting different approaches to risk assessment.[3]

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[2] The EPA has filed a motion to strike references to extra-record items cited by the various petitioners. The Industry petitioners have moved to supplement the record with these additional materials. For the reasons we state in the *Inactive Site Case*, 772 F.2d at 626 [part II], we deny the motions to strike and also deny all contested motions to supplement the record.

[3] The report states:

> "[I]n the process of risk assessment, many assumptions must be made. Scientists may be swayed in their choice of assumptions by their underlying regulatory philosophy. The choice of a linear non-threshold dose-response relationship compared to a linear quadratic or other relationship is a good case in point. As evidenced by the National Academy of Science's third report on Biological Effects of Ionizing Radiation (BEIR III), knowledgeable scientists disagree

Industry petitioners also protest strongly that the EPA acted inconsistently in the way these regulations require addressing the risks compared with other regulations promulgated under other acts: *e.g.*, control of radiation from high toxicity waste. We cannot evaluate here all the factors that caused the EPA to adopt a different approach in connection with its rulemaking under other laws, if indeed it did act differently. The record shows that the EPA did consider and respond to this inconsistency complaint. *See* II FEIS-AC at A.3-2 to -4. We are satisfied that the EPA acted consistently in formulating regulations for the inactive and active mill sites—except with respect to the ground water regulations, which we discuss separately in these opinions. That the EPA may be faulted for its rulemaking under other acts is not the kind of internal inconsistency we found to be arbitrary and capricious in *Squaw Transit Co. v. United States*, 574 F.2d 492, 495-96 (10th Cir. 1978).

The American Mining Congress and the State of Colorado make somewhat different arguments that a 5 pCi/g radium standard for land adjacent to a tailings pile is inconsistent with the radon emission standard of 20 pCi/m^2s on the pile itself. *See* 40 C.F.R. § 192.32(b) (separate standards listed). We accept the EPA's answer that there is not inconsistency and that the radium cleanup standard was designed to push concentrations in the land sufficiently low to allow unrestricted use, contrary to treatment of the tailings piles. *See* 48 Fed. Reg. at 45,947; II FEIS-AC at A.5-33.

IV

The EPA adopted a two part ground water standard for active mill sites. 40 C.F.R. § 192.32(a) (1) - (2). The primary standard, requiring use of a "liner," applies only

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on which dose-response relationship is best."

Subcommittee on Risk Assessment for Radionuclides, Scientific Advisory Board, U.S. Environmental Protection Agency, *Report on the Scientific Basis of EPA's Proposed National Emission Standards for Hazardous Air Pollutants for Radionuclides* 7.

to new waste depositories and to new portions of existing waste depositories. 48 Fed. Reg. at 45,941. The secondary standard, applicable to all impoundments, essentially adopts the standards EPA issued under the Solid Waste Disposal Act (SWDA) for hazardous wastes. *Id.* at 45,940. It requires monitoring and levels of concentration low enough to meet drinking water standards within 500 meters of the edges of the waste impoundments. *Id.* at 45,940-41.

The American Mining Congress argues that these ground water standards are unlawful because they apply within the boundaries of the mill sites, and because they impose management, design, and engineering requirements. These arguments to not impress us. We have dealt with the on-site question in the context of radium cleanup and radon emission standards in Part IV of the *Inactive Sites Case*, 772 F.2d at 629. We see nothing that compels a different conclusion in the EPA's adoption of ground water standards for active mill sites. The optimal method of preventing pollution of off-site water supplies is to prevent radiological and other hazardous substances from entering the ground water. General application standards that allow the NRC to choose the means of implementation are consistent with the authority Congress vested in the EPA. Although the regulations require a "liner" for new piles and extensions thereof, we understand that term to refer to any impermeable barrier the NRC may approve that will prevent seepage. *See, e.g.*, II FEIS-AC at A.1-28, A.4-7. The regulations require the industry to satisfy SWDA drinking water concentration standards at specified distances from the pile, but they do not dictate the kind of monitoring system that must be used or the method by which purity levels must be achieved. These decisions are left to the implementing agency, the NRC.*See id.* at A.1-22, A.6-2.

Section 275(b) of UMTRCA states that the EPA's generally applicable standards must provide "protection of human health and environment *consistent with* the standards required under subtitle (C) of the Solid Waste Disposal Act [SWDA], as amended, which *are applicable to such*

hazards . . . ." 42 U.S.C. § 2022(b)(2) (emphasis added). The industry petitioners' principal argument against the EPA's ground water regulations is that the standards adopted were regulations for high-toxicity low-volume chemical wastes and the EPA should have analogized to low-toxicity high-volume mining wastes. Thus, the argument is based upon the contention that the EPA did not adopt standards for *similar* hazards. Further, the industry petitioners assert that the mill tailings rest over aquifers unsuitable for use as drinking water and that it is improper for the EPA to establish drinking water standards.

The EPA made findings that conditions at tailing impoundments are not sufficiently different from the conditions it considered in developing SWDA standards to necessitate a change in approach. 48 Fed. Reg. at 45,941; II FEIS-AC at A.1-2 to -3. In its SWDA regulations the EPA refused to draw a distinction between high-volume low-toxicity mining wastes and low-volume high-toxicity chemical wastes. *See* 45 Fed. Reg. 33,140, 33,173-75 (1980) (discussion of basis for decision). Apparently Congress has barred the EPA from applying SWDA regulations to certain mining wastes pending an agency study that was incomplete at the time the EPA was required to promulgate final regulations for the active mine sites. *See* II FEIS-AC at A.1-2 to -3. Yet, the EPA was under pressure from Congress to promulgate license site standards by the October 1 deadline. Congress required the EPA to adopt general standards applicable to all sites. The EPA did adopt such standards. In this circumstance, the EPA acted permissibly in adopting standards equivalent to the drinking water standards.

United Nuclear argues that the EPA's ground water standards impermissibly intrude on state control of ground water, a contention that we summarily reject. If United Nuclear has standing to raise the question of preemption, *cf. Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 767 (10th Cir. 1980) (denying standing to pro-industry private organization seeking to challenge EPA air quality regulations), *cert. denied*, 450 U.S. 1050 (1981), we are

satisfied that the UMTRCA's directive provides the basis for preemption.

The environmental petitioners argue that the ground water regulations are inadequate. They first claim the EPA's decision not to apply the primary standard to existing tailings impoundments is unreasonable because seepage from these sources is already fouling the environment. The EPA's response is that the existing impoundments are only exempted from the primary standard requiring an impermeable barrier. The impoundments are still subject to the secondary standard. 40 C.F.R. § 192.32(a)(2). Violation of the secondary standard may require the operator to cease making new deposits and take corrective action. *Id.* § 192.33; *see* 48 Fed. Reg. at 45,941 (discussion of § 192.33). The EPA says it only adopts standards, leaving the methods to achieve the standards to those charged with management of the piles. It also argues that mandatory stoppage of adding to existing piles or removal of existing piles to new, lined impoundments could increase radon emissions and render additional large amounts of land permanently contaminated and unproductive by increasing the number of piles. *See* 48 Fed. Reg. at 19,594-95; II FEIS-AC at A.4-10. We accept as rational the EPA's reasoning on these points.

The environmental petitioners also contend that the EPA should require cleanup beyond the site boundaries. The EPA argues in response that the issue is not properly before us because it was not raised during the comment period and because the challenge is in reality one to the SWDA regulations themselves. In addition, the EPA explains that it determined that existing off-site contamination should be addressed through its emergency powers under SWDA and the "Superfund" statute, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9604, 9606. It notes 1984 congressional amendments to SWDA that require some changes in its approach under that act, and admits it must reevaluate its position under the UMTRCA in light of that development which occurred after it issued the active site

final regulations. *See* Brief of Respondents at 93 n.83. We accept as rational this explanation for not imposing requirements for outside-the-boundaries cleanup, and we cannot say the EPA'S actions were arbitrary or capricious.

The environmental petitioners assert that the EPA did not properly respond to comments during rulemaking, particularly those concerning "compliance point" monitoring, which suggested that seepage should be monitored in the vadose zone of rocks or sediment to detect pollution before it reaches the aquifers. We are satisfied that the EPA undertook a determined effort to respond to comments during the rulemaking period. *See generally* II FEIS-AC at A.1-1 to 7-5 (summarized comments and responses). The record shows that the EPA did respond to comments on ground water compliance point monitoring generally, and possible vadose zone monitoring in particular. *Id.* at A.4-36 to -37 (compliance point monitoring), A.6-2 to -3 (vadose zone monitoring). The response to comments on vadose zone monitoring was somewhat limited-but apparently because implementation of ground water monitoring has been left to the Nuclear Regulatory Commission. *See id.* at A.1-22, A.6-2. We cannot say that the ground water monitoring *guidelines* laid down by the EPA are irrational or unsuited to the task. *See* 48 Fed. Reg. at 45,942 (guidelines listed).

Petitioners Kepford and Johnsrud argue that the EPA did not give adequate consideration to deep well disposal of mill tailings. The record shows that the EPA did consider this proposal. *See, e.g.*, 48 Fed. Reg. at 19,590; *id.* at 45,931-32; I FEIS-AC at 8-16. The EPA acted within its powers in rejecting this method, rationally finding it had potential for more serious ground water contamination.

In sum, we reject all challenges to the EPA's ground water regulations for the active mill sites.

V

AMAX, Inc., one of the world's leading producers of molybdenum, has petitioned for review of the active site

regulations for the specific purpose of challenging the EPA's designation of molybdenum as a "hazardous constituent" of uranium and thorium mill tailings and subjecting molybdenum to the ground water protection standards. No other petitioner has focused any attack on the identification of particular minerals as non-radiological hazards. Therefore, before considering the merits of AMAX's claims we must consider AMAX's standing to raise the issues in its petition. The EPA asserts that AMAX lacks standing to challenge any aspect of the UMTRCA active site regulations because it does not own or operate any licensed uranium mill tailings sites and therefore is not affected by the regulations. The regulations specifically state that molybdenum is listed as a hazardous constituent "only for purposes of controlling uranium and thorium byproduct materials. EPA does not intent in this rulemaking to add molybdenum . . . to the SWDA list of hazardous constituents." 48 Fed. Reg. 45,926, 45,944 (1983).

Two sections of the United States Code apply directly to this case. The UMTRCA itself provides that

> "[j]udicial review of any rule promulgated under this section may be obtained by *any interested person* only upon such person filing a petition for review within sixty days after such promulgation in the United States court of appeals for the Federal judicial circuit in which such person resides or has his principal place of business. . . . The court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief as provided in such chapter."

42 U.S.C. § 2022(c)(2) (emphasis added). Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 states that

> "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a rele-

> vant statute, is entitled to judicial review thereof."

The concept of standing combines both constitutional and prudential considerations. *See Allen v. Wright*, 52 U.S.L.W. 5110, 5114 (U.S. July 3, 1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *Ozonoff v. Berzak*, 744 F.2d 224, 227 (1st Cir. 1984). At a minimum, Article III of the constitution requires

> "the party who invokes the court's authority to 'show [1] that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' . . . and [2] that the injury 'fairly can be traced to the challenged action' and [3]'is likely to be redressed by a favorable decision.' "

Valley Forge Christian College, 454 U.S. at 472 (citations omitted).

As a preliminary matter, we note that the reviewing court, when ruling on a motion to dismiss for lack of standing, "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Even reading AMAX's petition and affidavit generously, we hold that it fails to meet either the constitutional or prudential requirements of the standing doctrine.

First, the injury that AMAX claims it would suffer as a result of the EPA's listing of molybdenum as a toxic substance is indirect. Neither AMAX nor its customers own any uranium mill tailings sites. Therefore, they are not subject to the UMTRCA or its regulations. AMAX, however, alleges that state and local agencies that regulate AMAX's customers are likely to restrict or prohibit the discharge of molybdenum if the EPA classifies molybdenum as a hazardous substance. *See* Affidavit of Dr. Gary G. Van Riper (Deputy Director of Environmental Control, Climax Molybdenum Company, division of AMAX). If this

should occur, AMAX would be unable to sell its product and would suffer economic injury. Although an indirect injury can be sufficient to confer standing on a party, the Supreme Court has stated:

> "When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights . . . . But it may make it substantially more difficult to meet the minimum requirements of Art. III: To establish that, in fact, the asserted injury was the consequence of the defendant's actions, or that prospective relief will remove the harm."

Warth v. Seldin, 422 U.S. at 504-05 (citation omitted).

Although the challenged regulation was adopted over two years ago, AMAX does not refer to a single agency that has restricted or proposed to restrict discharge of molybdenum as a result of this action. AMAX refers only to a *proposed* state regulation in Texas in 1979 classifving molybdenum as a toxic substance that was used as the basis for similar regulations in New Orleans, El Paso, and Dallas. Affidavit of Dr. Gary G. Van Riper at 2-3. Absent any allegation that a single state or local agency has considered adopting the EPA's classification of molybdenum as a hazardous substance, we believe that AMAX has failed to demonstrate that it has or will suffer "concrete and certain harm" as a result of the EPA's action. *National Collegiate Athletic Ass'n v. Califano*, 622 F.2d 1382, 1386 (10th Cir. 1980); *see also United States v. SCRAP*, 412 U.S. 669, 688-89 (1973) ("A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action.").

In reaching this conclusion, we are also influenced by the decision of the United States Court of Appeals for the District of Columbia Circuit in *Association of Investment Brokers v. SEC*, 676 F.2d 857 (D.C. Cir. 1982). In that case, the petitioners challenged the Securities and Exchange Commission's (SEC) adoption of revisions to Form U-4, the Uniform Application for Securities Industry Registration. *Id.* at 858-59. The SEC only required broker-dealers that it directly regulated to use the form. *Id.* at 859. However, forty-six states and several self-regulatory organizations, including the National Association of Securities Dealers, Inc. and the New York Stock Exchange, also adopted Form U-4. The petitioners were not subject to the SEC's regulation; instead, they alleged that they were indirectly injured by the SEC when other regulatory organizations and states adopted the SEC revisions. In rejecting standing, the court stated that "[a]n order to the Commission concerning the form could require cancellation or modification of provisions for SECO broker-dealer filings but could direct the self-regulatory organizations and the states to follow suit." *Id.* at 862. The situation before us is comparable; if state and local agencies follow the EPA and classify molybdenum as a toxic substance, AMAX's complaint should be raised before these entities. Indeed, it is possible that the EPA's classification of molybdenum will cause the state and local entities to initiate their own investigations of the toxicity of molybdenum. If so, it would be the rules adopted as the result of such investigations that might injure AMAX, not the EPA's actions under an act that does not regulate AMAX's business.

Even if we were to find that AMAX has met the constitutional requirements for standing, we would have to deny its standing based on prudential factors. The Supreme Court recently described the prudential aspects of a court's determination of standing:

> "Standing doctrine embraces several judicially self- imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a

> "if, pursuant to what it perceives to be its statutory authority, a government agency regulates the contractual relationships between a regulated party and an unregulated party, the latter as well as the former may have interests that are arguably within the regulated zone for purposes of testing standing, . . ."

Id. at 1367. In contrast, neither AMAX, its customers, nor the state and local agencies that might adopt the EPA regulations are regulated under the UMTRCA.

In addition, in each of the cases that AMAX cites, the plaintiff was injured when an agency effectively forbade a third party from entering into or continuing a beneficial relationship with the plaintiff. *See Cotovsky-Kaplan Physical Therapy Assoc. Ltd. v. United States*, *supra*; *Apter v. Richardson*, 510 F.2d 351 (7th Cir. 1975) (subject on behalf of whom application for government grant was submitted entitled to challenge denial of grant).[4] In the instant case, however, the EPA has exercised no authority over either AMAX or its customers.

Accordingly, based on both constitutional and prudential factors, we deny AMAX standing and do not consider its arguments on the merits.

VI

The challenges of all petitioners are rejected; we affirm the validity of the active mill site regulations.

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[4] AMAX also cites *New Jersey Chapter Incorporated of the American Physical Therapy Ass'n v. Prudential Life Ins. Co.*, 502 F.2d 500 (D.C. Cir. 1974), *cert denied*, 420 U.S. 1004 (1975). In this decision, however, the court never decided the standing issue because it determined that, regardless of standing, the defendants would prevail on the merits. *Id.* at 504.

SEPTEMBER TERM - October 30, 1985

Before Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Circuit Judges, and Honorable Luther Bohanon*

Nos. 83-1014
83-1041
83-1206
83-1300

AMERICAN MINING CONGRESS, a Colorado corporation, *et al.*,

Petitioners.

v.

LEE M. THOMAS, etc.,*et al.*,

Respondents,

THE SIERRA CLUB, *et al.*,

Intervenors,

THE STATE OF WYOMING,

Amicus Curiae.

This matter comes on for consideration of Petitioners' petitions for rehearing and suggestions for rehearing in banc filed in the captioned causes.

Upon consideration whereof, the petitions for rehearing are denied by the panel to whom the cases were argued and submitted.

*District Judge of the United States District Court for the Western District of Oklahoma, sitting by designation.

The petitions for rehearing having been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing in banc are denied.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

SEPTEMBER TERM - October 30, 1985

Before Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Circuit Judges, and Honorable Luther Bohanon*

Nos. 83-2226
83-2227
83-2277
83-2504
Nos. 84-1352
84-1908

AMERICAN MINING CONGRESS, *et al.*,
Petitioners,

v.

LEE THOMAS, *etc. et al.*,
Respondent.

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/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 192
[A-FRL 2211-8a]

Standards for Remedial Actions at Inactive Uranium Processing Sites

AGENCY: U.S. Environmental Protection Agency.
ACTION: Final rule.

SUMMARY:

We are issuing final health and environmental standards to govern stabilization, control, and cleanup of residual radioactive materials (primarily mill tailings) at inactive uranium processing sites. These standards were developed pursuant to Section 275 of the Atomic Energy Act (42 U.S.C. 2022), as added by Section 206 of the Uranium Mill Tailings Radiation Control Act of 1978 (Pub. L. 95-604), and were proposed in April 1980 and January 1981.

The standards apply to tailings at locations that qualify for remedial action under Title I of Pub. L. 95-604. The standards for control provide that the tailings be stabilized in a way that gives reasonable assurance that the health hazards associated with the tailings will be controlled and limited for a long period of time. They also establish a requirement to control releases of radon from tailings piles. The standards for cleanup set limits on the radon decay-product concentration and gamma radiation levels in buildings affected by tailings and on the radium-226 concentration in contaminated land.

In response to comments on the proposed standards for disposal and for cleanup, we have evaluated a number of alternatives in terms of their costs and the reductions achievable in potential health effects. A number of changes have been made, including raising some of the numerical limits and eliminating some requirements. The purpose of most of these changes is to make implementation easier

and less costly. The changes should not result in any substantial loss of health or environmental protection over that which would have been provided by the proposed standards.

EFFECTIVE DATE: The final standards take effect on March 7, 1983.

ADDRESSES: *Final Environmental Impact Statement.* Background information is given in the Final Environmental Impact Statement for Remedial Action Standards for Inactive Uranium Processing Sites. (FEIS), EPA Report 520/4-82-013-1. Single copies of the FEIS, as available, may be obtained from the Program Management Office (ANR-458), Office of Radiation Programs, U.S. Environmental Protection Agency, Washington, D.C. 20460; telephone number 703-557-9351.

Docket. Docket Number A-79-25 contains the rulemaking record. The docket is available for public inspection between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section (A-130), West Tower Lobby, 401 M Street, S.W., Washington, D.C. 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT:
Dr. Stanley Lichtman, Guides and Criteria Branch (ANR-460), Office of Radiation Programs, U.S. Environmental Protection Agency, Washington, D.C. 20460; telephone number 703-557-8927.

SUPPLEMENTARY INFORMATION:

I. Introduction

On November 8, 1978, Congress enacted the Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. 95-604 (henceforth designated "the Act"). In the Act, Congress stated its finding that uranium mill tailings ". . . may pose a potential and significant radiation health hazard to the public, . . . and . . . that every reasonable effort should be made to provide for stabilization, disposal, and control in a safe and environmentally sound manner of such tailings in order to prevent or minimize radon dif-

fusion into the environment and to prevent or minimize other environmental hazards from such tailings." The Administrator of the Environmental Protection Agency (EPA) was directed to set ". . . standards of general application for the protection of the public health, safety, and the environment . . ." to govern this process of stabilization, disposal, and control.

The Act directs the Department of Energy (DOE) to conduct necessary remedial actions at designated inactive uranium processing sites to achieve compliance with the standards established by EPA. Standards are required for two types of remedial actions: control and cleanup. Control is the operation which places the tailings piles in a condition that will minimize the risk to man for a long time. Cleanup is the operation which reduces the potential health consequences of tailings that have been dispersed from tailings piles by natural forces or removed by man and used elsewhere in buildings or land.

In April 1980, we proposed standards for cleanup of tailings (45 FR 27370, April 22, 1980) and made them effective immediately as interim standards (45 FR 27366, April 22, 1980). We took this action to allow DOE to begin remedial work immediately at some contaminated buildings which posed a high level of risk. In January 1981, we proposed standards for control of tailings piles (46 FR 2556, January 9, 1981) and issued a Draft Environmental Impact Statement (DEIS) covering both the control and cleanup standards. Public hearings on the standards were held in Salt Lake City, Utah, on April 24-25, 1981; in Durango, Colorado, on April 27-28, 1981; and in Washington, D.C., on May 14-15, 1981.

We received a wide range of responses to the proposed standards and the DEIS. Sixty-eight substantive comment letters were received and twenty-three individuals testified or submitted comments at the public hearings. Comments were received from a broad spectrum of participants, including private citizens, public interest groups, members of the scientific community, representatives of industry,

and State and Federal agencies. We have carefully reviewed and considered these comments in preparing the FEIS and in promulgating these final standards. The written comments are reproduced in the FEIS, which also contains our detailed responses. The major issues raised in public comments, our response to them, and the detailed changes in the standards are given in Sections III and IV. Below we simply summarize the major conclusions reached as a result of our review.

These standards are established to satisfy the purposes of the Act to "... stabilize and control ... tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public." The Act does not provide specific criteria to be used in determining that these purposes have been satisfied. We have therefore made it our objective to establish standards that take account of the tradeoffs between costs and benefits in a way that assures adequate protection of the public health, safety, and the environment; that can be implemented using presently available techniques and measuring instruments; and that are reasonable in terms of overall costs and benefits. We have been especially cognizant of the need to differentiate what would be desirable from what we believe to be necessary to achieve the purposes of the Act.

Substantial dissatisfaction with the proposed standards was expressed in written comments and at the public hearings. In response to these views, we carefully evaluated a number of alternatives with respect to the above factors. Details of each of the alternative control and cleanup standards we considered are given in the FEIS. Selected results of our analysis that are pertinent to our choices for each part of the final standard are given in Section III of this Notice. The following table contains a summary of the alternative standards we considered for control of tailings piles.

ALTERNATIVE STANDARDS FOR CONTROL OF URANIUM MILL TAILINGS PILES

Alternative	Principal requirements		
	Minimum time that controls should prevent erosion and misuse (years)	For radon emission from top of pile (pCi/m²s)	For water quality protection
No standards	None (radioactivity decays to 10 percent in 265,000 yr)	No limit (The average emission is 500 pCi/m²s)	None (Toxic chemicals in tailings at concentrations 100 times background)
EPA proposed standard	1,000	2 above background	No increased concentration of toxic chemicals
Alternative A	1,000 to 10,000	2 above background	No degradation that would prevent present uses
Alternative B	200 to 1,000	20	Guidance, based on water quality criteria
Alternative C	Indefinite, long term	100	Guidance, based on water quality criteria
Alternative D	Durable cover, 100-yr institutional control, discourage moving of piles	No requirement	Prevent significant erosion of tailings to surface water or ground water, or treat water before use
Alternative E	Minimal cover to prevent wind-blown erosion only; 100- to 200-yr institutional control, move only piles in immediate danger due to floods	No requirement	No protection required

The alternative cleanup and control standards can be generally categorized as:

(1) *Least cost* alternatives which provide minimum acceptable health protection, and depend upon the use of institutional methods of control;

(2) *Optimized cost-benefit* alternatives which provide longer term health protection, without reliance on institutional controls, but at somewhat higher costs; and

(3) *Nondegradation* alternatives which attempt to achieve close to the same environmental consequences as might occur if the ore had not been mined; these entail much higher costs, and could result in some undesirable environmental consequences.

Our analysis was based on assuming that remedial actions to satisfy "least cost" tailings pile control standards would entail applying a thin earthen cover and little or no reinforcement of relatively steep side slopes. Integrity of the cover would be assured through active maintenance for 100 years. Only minimal flood protection measures would be applied, and as few as one pile would be moved to a more stable location. Covers would be progressively thicker and less dependent upon care under the more stringent alternatives, with more gradual slopes and greater use of rock for reinforcement. Under the "nondegradation" alternatives, up to half of the piles would be moved to satisfy either water protection or longevity requirements.

The alternative cleanup standards would require progressively more complete removal of tailings from more buildings. Remedial methods that do not involve tailings removal may be used on a limited basis under all but "nondegradation" alternatives.

The more stringent land cleanup alternatives require more complete removal of contaminated material, implying that larger areas may be cleaned up at each contaminated location and somewhat greater numbers of sites qualify for cleanup.

We concluded that the standards we originally proposed approach a "nondegradation" alternative that would, in at least some cases, be difficult to implement, since they specify cleanup and control limits close to background levels. More importantly, the small incremental health benefits, when compared to the benefits for less stringent alternatives, do not appear to justify the large additional costs.

We selected an "optimized cost-benefit" rather than a "least cost" alternative for the final standards, in part because it provides much greater protection of health at only a small increase above the least cost alternatives, and in part because it does not place primary reliance on institutional methods of control. The final standards provide for:

(1) *Control systems for tailings piles* -- Control and stabilization which will ensure, to the extent reasonably achievable, an effective life of 1000 years, and in any case, for at least 200 years. This control and stabilization will be designed to provide a barrier which will effectively minimize the potential for misuse and spread of the tailings, limit the average radon emission from the surface of tailings piles to no more than 20 pCi/m^{2}s,[1] protect against flooding, and protect from wind and water erosion. We have also provided an alternative equivalent to the radon emission limit that is stated in terms of the maximum radon concentration in air at locations off the pile.

(2) *Flood control* -- Diking or other flood protection controls given first consideration, rather than moving piles, when there is a risk from floods.

(3) *Control of waterborne pollutants* -- DOE should assess each site and establish any corrective or preventive pro-

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[1] A curie is the amount of radioactive material that produces 37 billion nuclear transformations (e.g., decays of radium into radon) per second. A picocurie (pCi) is a trillionth of a curie. One picocurie of material produces just over two transformations per minute. pCi/m-s is a unit for the release rate of radioactivity from a surface (m = meter, s = second). pCi/g is a unit for the radioactivity concentration in a mass of material (g = gram).

grams found necessary to meet relevant State and Federal Water Quality Standards and to be consistent, to the maximum extent practicable, with the Solid Waste Disposal Act, as amended.

(4) *Cleanup of buildings* -- An objective for reduction of radon decay products of 0.02 WL,[2] with a maximum limit of 0.03 WL.

(5) *Cleanup of dispersed tailings* -- Limitations of soil radium content to 5 pCi/g (above background) averaged over the top 15 centimeters of soil, and to 15 pCi/g averaged over any 15 centimeters of soil below this.

(6) *Cleanup of off-site land* -- Remedial actions applied only to situations that constitute a hazard; in those cases, cleanup equivalent to the above standard for dispersed tailings.

The Table below provides a summary comparison of the proposed and final standards. The following sections provide a more detailed discussion of the basis for the final standards.

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[2] A "working level" (WL) is any combination of short-lived radon decay products in one liter of air that will result in the ultimate emission of alpha particles with a total energy of 130 billion electron volts. Working level is a measure of the concentration of radioactivity in the air, not of how much radiation a person actually receives.

SUMMARY COMPARISON OF PROPOSED AND FINAL STANDARDS

	Proposed	Final
Control of Tailings Piles:		
1. Longevity	At least 1000 years	Up to 1000 years, to the extent reasonably achievable, but at least 200 years.
2. Radon emissions from disposal site	2 pCi/m ^{2}ac, equivalent to about 99.6% reduction.	20 pCi/m ^{2}ac, *or* 0.5 pCi/1 in air outside the disposal site, equivalent to about 96% reduction.
3. Water production	Specific limits for a number of toxic and radioactive contaminants in groundwater, nondegradation of surface water.	Use existing State and Federal standards: apply site-specific measures where needed.
Cleanup of Buildings:		
1. Indoor radon decay products	Shall not exceed 0.015 WL	Shall not exceed 0.03 WL to the extent practicable, achieve 0.02 WL.
2. Indoor gamma radiation	20 microA/hr	Unchanged.
Cleanup of Land:		
1. Surface	5 pCi/g in any 5 cm layer within one foot of surface.	5 pCi/g in the 15 cm surface layer.
2. Buried	5 pCi/g in any 15 cm layer below one foot.	15 pCi/g in any 15cm layer below the surface layer.
Exceptions:		
1. Procedure	Site-specific exception procedures	Supplemental standards (may be applied on generic or site-specific basis).
2. Applicability	Where health and safety would be endangered, or where costs clearly outweigh benefits.	Same as proposed; criteria also provided to avoid cleanup of samll amounts of tailings and inaccessable tailings posing minimal hazards.

It should be noted that these standards in no way are intended to establish precedents for other situations or regulations involving similar environmental objectives, but with different economic and/or technological circumstances. For example, our forthcoming proposed standards for active uranium mills will be based on an independent analysis of operating and future mills, which may result in different standards. Similarly, our remedial action standard for contaminated buildings should not be taken as an appropriate design goal for indoor radon decay product concentration in new housing, or as a remedial action goal appropriate for all circumstances.

II. Summary of Background Information

Beginning in the 1940's, the U.S. Government purchased uranium for defense purposes. As a result, large quantities of tailings were created by the uranium milling industry. These tailings are a sand-like material, and are attractive for use in construction and soil conditioning. Most of these mills are now inactive, and the ultimate disposal of their tailings has not yet taken place. In addition, tailings have been dispersed from the piles at most of the sites by natural forces, or have been removed by man for use in or around buildings, or on land. The Act provides for the cleanup of these offsite tailings as well as for the long-term control of the tailings piles.

Congress designated twenty-two inactive sites, and the Department of Energy has added two more. The sites are located in the West, predominantly in arid areas, except for a single site at Canonsburg, Pa. Tailings piles at these sites range in area from 5 to 150 acres and in height from a few feet to as much as 230 feet. The amount of tailings at each site ranges from only residual contamination to 2.7 million tons. The twenty-four designated sites combined contain about 26 million tons of tailings covering a total of about 1,000 acres.

The most important hazardous constituent of uranium mill tailings is radium, which is radioactive. We estimate that these tailings contain a total of about 15,000 curies

of radium. Radium, in addition to being hazardous itself, produces radon, a radioactive gas whose decay products can cause lung cancer. The amount of radium in tailings, and, therefore, the rate at which radon is produced, will decay to about 10% of the current amount in several hundred thousand years. Other potentially hazardous constituents of tailings include arsenic, molybdenum, selenium, uranium, and, usually in lesser amounts, a variety of other toxic substances. The concentrations of these materials vary from pile to pile.

Radiation and toxic materials may cause a variety of cancers, and other diseases, as well as genetic damage and teratogenic effects. Tailings are hazardous to man because: (1) decay products of radon may be inhaled and increase the risk of lung cancer; (2) individuals may be exposed to gamma radiation from the radioactivity in tailings; and (3) radioactive and toxic materials from tailings may be ingested with food or water. We believe the first of these hazards is clearly the most important.

The radiation hazard from tailings lasts for many hundreds of thousands of years, and some nonradioactive toxic chemicals persist indefinitely. The hazard from uranium tailings therefore must be viewed in two ways. In themselves, the tailings pose a present hazard to human health. Beyond this immediate, but generally limited, health threat, the tailings are vulnerable to human misuse and to dispersal by natural forces for an essentially indefinite period. In the long run, this threat of expanded, indefinite contamination overshadows the present dangers to public health. The Congressional report accompanying the Act expressed the view that the methods used for remedial actions should not be effective for only a short period of time. It stated: "The committee believes that uranium mill tailings should be treated . . . in accordance with the substantial hazard they will present until long after existing institutions can be expected to last in their present forms," and, that "The Committee does not want to visit this problem again with additional aid. The remedial action

must be done right the first time." (H.R. Rep. No. 1480, 95th Cong., 2nd Sess., Pt. I, p. 17, and Pt. II, p. 40 (1978).)

For the purpose of establishing standards for the protection of health, we assume a linear, nonthreshold dose-effect relationship as a reasonable basis for estimating risks to the general public from radiation. This means we assume that any radiation dose poses some risk and that the risk of low doses is directly proportional to the risk that has been demonstrated at higher doses. We recognize that the data available preclude neither a threshold for some types of damage below which there are no harmful effects, nor the possibility that low doses of gamma radiation may be less harmful to people than the linear model implies. However, the major radiation hazard from tailings arises from alpha radiation, and the National Academy of Sciences' Advisory Committee on the Biological Effects of Ionizing Radiation (the BEIR Committee) stated in their 1980 report that for ". . . radiation, such as from internally deposited alpha-emitting radionuclides, the application of the linear hypothesis is less likely to lead to overestimates of risk, and may, in fact, lead to underestimates."

Our quantitative estimates of radiation risk are based on our review of epidemiological studies, conducted in the United States and in other countries, of underground miners of uranium and other metals who have been exposed to radon decay products, and on three reports: *The Effects on Populations of Exposure to Low Levels of Ionizing Radiation* (1972) and *Health Effects of Alpha Emitting Particles in the Respiratory Tract* (1976) by the BEIR Committee, and the report of the United Nations Scientific Committee on the Effects of Atomic Radiation entitled *Sources and Effects of Ionizing Radiation* (1977). Details of our risk estimates are provided in *Indoor Radiation Exposure Due to Radium-226 in Florida Phosphate Lands* (EPA 520/4-78-013) and in the FEIS.

Although the studies of underground miners show that there is a significant risk of lung cancer from exposure to radon decay products, there is some uncertainty about

its magnitude. Exposures of miners are estimated from the time spent in each location in a mine and the measured radon decay product levels at those locations. However, radon decay product measurements were infrequent and often nonexistent for exposures of miners prior to the 1960's. The uncertainty increases when data for miners are used to estimate risk to the general population because there are differences in age, physiology, exposure conditions, and other factors between the two populations. Nevertheless, we believe the information available provides an estimate of risk which is probably reliable within a factor of two or three, and that this constitutes an adequate basis for these standards.

It is not possible to reduce the risk to zero for people exposed to radiation or, for that matter, to many other hazardous materials. In order to decide on an appropriate level of a small residual risk, we evaluated the costs and benefits of different levels of control. We also considered technical difficulties associated with implementing different levels of control.

The legislative record shows that Congress intended that EPA set general standards and not specify any particular method of control. Therefore, our analyses of control methods, costs, risks, and other pertinent factors emphasize the general characteristics of uranium mill tailings and the designated sites. The Act gives other agencies of the Federal Government the responsibility to decide how to satisfy these standards at specific sites. They will issue site-specific Environmental Impact Statements or Environmental Assessments, as appropriate, covering such matters.

The information upon which we based these health and environmental standards for control and cleanup of tailings from inactive uranium processing sites is summarized below. Additional background information and more complete presentations are given in our notices of proposed rulemaking (45 FR 27370, April 22, 1980, and 46 FR 2556, January 9, 1981) and in the FEIS.

A. The Risks from Tailings

Uranium mill tailings can affect man through four principal environmental pathways:

• *Diffusion of radon-222, the decay product of radium-226, from tailings into indoor air.* Breathing radon-222, an inert gas, and its short half-life decay products, which attach to tiny dust particles, exposes the lungs to alpha radiation (principally from polonium-218 and polonium-214). The exposures involved may be large for persons who have tailings in or around their houses, or who live very close to tailings piles. Additional, but smaller, exposures to alpha radiation may result from long-lived radon-222 decay products (principally lead-210 and polonium-210). Exposure due to radon from tailings in or around buildings is best estimated from direct measurements of its decay products in indoor air.

• *Direct exposure to gamma radiation.* Many of the radioactive decay products in tailings produce gamma radiation. The most important are lead-214, bismuth-214, and thallium-210. Hazards from gamma radiation are limited to persons in the immediate vicinity of piles or removed tailings. Exposure due to gamma radiation from tailings is readily estimated from direct measurements.

• *Dispersal of small particles of tailings material in the air.* Wind erosion of unstabilized tailings piles creates airborne tailings material. The predominant dose is to the bones from eating foods contaminated by thorium-230, radium-226, and lead-210, and is small. Exposure due to airborne transport of radon and particulates from a pile usually cannot be directly measured, but may be estimated using meteorological transport models.

• *Waterborne transport of radioactive and toxic material.* Dispersal of unstabilized tailings by wind or water, or leaching, can carry radioactive and other toxic materials to surface or ground water. Current levels of contamination appear to be low or nonexistent. However, some long-term future contamination of surface and ground

water and consequent intake by man and animals is possible. Potential exposures due to the transport of waterborne contaminants are highly site-specific and can generally only be determined by a careful survey program.

The following discussion of risks focuses largely on current biological effects; however, these current effects could be expanded by future misuse of tailings by man and by uncontrolled effects of natural forces. Our standards reflect consideration of both current and future impacts of tailings.

1. *Air Pathways.* We estimated the hazards posed by radon emissions to air from uranium mill tailings piles and from tailings used in and around houses. For the first case we used meteorological models and considered people in the neighborhood of the pile, the population in the local region, and the remainder of the national population. For the second, we drew largely upon experience from contaminated houses in Grand Junction, Colorado. Four sources of exposure were considered; inhaled short-lived radon decay products, gamma radiation, the long-lived radon decay products, and airborne tailings.

From our analysis we conclude:

(a) Lung cancer caused by the short-lived decay products of radon is the dominant radiation hazard from tailings. Effects of gamma radiation, of long-lived radon decay products, and of airborne tailings from the piles are generally much less significant, although high gamma radiation doses may sometimes occur.

(b) Individuals who have tailings in or around their houses often have large exposures to indoor radon and hence high risks of lung cancer. For example, in 50% of a sample of 190 houses with tailings in Grand Junction, Colorado, we estimate that the lifetime excess risk due to exposure to short-lived radon decay products prior to remediation may have been greater than 4 chances in 100.

(c) Individuals living near an uncontrolled tailings pile are also subjected to high risks from short-lived radon

decay products. For example, we estimate that people living continuously next to some of the piles may have lifetime excess lung cancer risks as high as 4 chances in 100.

(d) Based on models for the cumulative risk to all exposed populations, we estimate that, without remedial action, the radon from all the inactive sites considered together could cause about 170 to 240 potential excess lung cancer deaths per century. Of these, 55% to 80% are projected to occur among persons living less than 50 miles from a pile.

There is a substantial uncertainty in these estimates because of uncertainties in the rate of release of radon from tailings piles, the exposure people will receive from its decay products, and from our incomplete knowledge of the effects on people of these exposures. In addition, our estimates are based upon current sizes and geographical distributions of populations. If populations increase in the future, the estimated impact would be larger.

We concluded that a primary objective of standards for *cleanup* of tailings should be to remove or reduce existing and potential risks due to radon decay products indoors. Such risks from indoor radon decay products arise in two ways -- in existing buildings where tailings were used in construction and cause elevated levels, and from land contaminated sufficiently to cause elevated levels in new construction. A secondary objective should be to reduce high exposures to gamma radiation due to tailings in buildings or on land away from the tailings piles.

We concluded that a primary objective of standards for *control* of tailings should be isolation and stabilization to prevent their misuse by man and dispersal by natural forces, such as wind, rain, and flood waters. A second objective should be to reduce radon emissions from tailings piles. A third objective should be the elimination of significant exposure to gamma radiation from tailings piles.

2. *Water Pathways.* Although water contamination does not now appear to be a significant source of immediate radiation exposure at the piles, both radionuclides and non-

radioactive toxic substances, such as arsenic, molybdenum, and selenium, could be leached or otherwise removed from tailings and contaminate water resources. If this occurred, it could then affect crops, animals, and people. Such contamination could, in principle, be caused by either past or future releases from the tailings. Tailings piles at inactive sites have already lost most of the water deposited in them during mill operations through evaporation and seepage. However, elevated concentrations of radioactive or toxic substances in ground water have been observed at only a few of the designated sites (four are identified in the FEIS), and in some standing water ponds (but not in running water). Any future water contamination would arise from the effects of rain or through flooding of a pile, from penetration of a pile from below by ground water, or from leaching of tailings transported off a pile.

A theoretical analysis performed for the Nuclear Regulatory Commission (NRC) of a larger model pile showed that contamination of ground water by selenium, sulfate, manganese, and iron might exceed current drinking water standards over an area 2 kilometers wide and 8 to 30 kilometers long. However, more than 95% of this projected contamination was attributable to initial seepage of process water discharged to the pile during mill operations. The movement of contaminants through a pile and subsoil to ground water depends on a combination of complex chemical and physical properties, as well as on local precipitation and evaporation rates. Chemical and physical processes can effectively remove or retard the flow of many toxic substances passing through subsoil. However, some contaminants such as arsenic, molybdenum, and selenium, can occur in forms that are not removed. Typically, ground water can move as slowly as a few feet per year, and only in coarse or cracked materials does the speed exceed one mile per year. For these reasons, contaminants from tailings may not affect the quality of nearby water supply wells for decades or longer after they are released. However, once contaminated, the quality of water supplies cannot usually be easily restored simply by eliminating the

source (although, in some cases removing or isolating the tailings may contribute to improving water quality).

Based on results from the NRC generic model for mill tailings piles, it is likely that the few observed cases of ground water contamination resulted from seepage of the original liquid waste discharges from the mill. Additional future contamination of ground water should be much smaller, and in most cases would be expected to be minimized by measures required to control misuse of tailings by man and dispersal by wind, rain, and flood waters. These measures should also effectively eliminate the threat of contamination of surface water by runoff or from leaching of tailings transported off piles, and provide reasonable protection of surface and ground water from contamination by flooding. However, at a few specific sites, especially in areas of high rainfall or where ground water tables intersect the piles, special consideration of possible future contamination of ground water may be needed.

Though a few sites appear to have some existing contamination due to the presence of tailings, we believe it will usually not be feasible or practical to remove the contaminants from subsoil or ground water. Whether or not it is feasible or practical to restore an aquifer and to what degree will depend on site-specific factors, such as the ability to restore the aquifer in its hydrogeologic setting, the cost, the present and future value of the aquifer as a water resource, the availability of alternative supplies, and the degree to which human exposure is likely to occur.

We concluded that potential contamination of surface and ground water at the inactive sites must be considered on a site-specific basis. The remedial program should provide for adequate hydrological and geochemical surveys of each site as a basis for determining whether specific water protection or cleanup measures should be applied. In many cases, the control measures needed for other purposes should reduce any potential for contamination.

In addition to the available information upon which we based our conclusion, hydrological and geochemical studies

are presently being conducted or planned at a number of sites. The purpose of these studies is to gather additional information so as to more fully assess any actual or potential ground water contamination and to better understand the mechanism of contaminant movement. The studies will identify the extent and character of contaminants remaining in the piles, as well as the direction, rate of movement and degree of attenuation of any contaminants already released. In particular, attention is being given to identifying the likelihood of contaminants reaching an actual or potential water supply source. We are currently reviewing current studies and will review future studies assessing the site-specific factors related to potential ground water contamination.

As stated previously in this Section II, site-specific Environmental Assessments (EAs) or Environmental Impact Analyses (EIAs) will be prepared for each site. We will review the information generated as part of those. The EAs or EIAs would gather data on a site-specific basis which would either characterize the site completely or confirm the use of general models in determining potential mechanisms for impact or lack of impact on ground water.

We believe that it is important to conclude these studies as quickly as possible. These studies will provide a more complete data and analytical base to allow us to reevaluate the decision not to set ground water protection standards. Information to be obtained as a part of the studies will include the response of the tailings and interstitial fluids to water table and precipitation stimuli; distribution of radionuclides and other contaminants within the tailings pile; identification of mobile constituents within the tailings and ground water system; and analyses of the mechanisms for the release and transport of the contaminants both to the surface and downward to ground water.

To date, the results of more recent studies than those we described in our FEIS strongly support our decision not to issue general numerical water protection standards. We intend to continue to review additional information as

it becomes available, and will reconsider our decision if the need to do so becomes apparent.

B. Cleanup and Control of Tailings

1. *Control of Tailings Piles.* The objectives of tailings control and stabilization efforts are to prevent their misuse by man, to reduce radon emissions (and gamma radiation exposure), and to avoid the contamination of land and water by preventing erosion by natural processes. The longevity (i.e., long-term integrity) of control is particularly important. This is affected by the potential for disruption by man; by the probability of occurrence of such natural phenomena as earthquakes, floods, windstorms, and glaciers; and by chemical and mechanical processes in the piles. Prediction of the long-term integrity of control methods becomes less certain as the period of concern increases. Beyond several thousand years, long-term geological processes and climatic change become the dominant factors.

Methods to prevent misuse by man and disruption by natural phenomena may be divided into those whose integrity depends upon man and his institutions ("active" controls) and those that do not ("passive" controls). Examples of active controls are fences, warning signs, restrictions on land use, and inspection and repair of semipermanent tailings covers, temporary dikes, and drainage courses. Examples of passive controls are thick earthen covers, rock covers, massive earth and rock dikes, burial below grade, and moving piles out of locations highly subject to erosion, such as unstable river banks.

Erosion of tailings by wind, rain, and flooding can be inhibited by contouring the pile and its cover, by stabilizing the surface (with rock, for example) to make it resistant to erosion, and by constructing dikes. If necessary, erosion can be inhibited by burying tailings in a shallow pit or moving them away from a particularly flood-prone or otherwise geologically unstable site.

Methods to control release of radon range from applying a simple barrier (such as an earthen cover) to such am-

bitious treatments as embedding tailings in cement or processing them to remove radium, the precursor of radon. Covering tailings with a permeable (porous) barrier, such as earth, delays radon diffusion so that most of it decays and is effectively retained in the cover. In addition to simple earthen covers, other less permeable materials such as asphalt, clay, or soil cement, usually in combination with earthen covers, may be used. The more permeable the covering material, the thicker it must be to achieve a given reduction in radon release. However, maintaining the integrity of very thin impermeable covers, such as plastic sheets, even over a period as short as several decades is unlikely given the chemical and physical stresses present at piles.

The most likely constituents of covers for use to control tailings are locally available earthen materials. The effectiveness of an earthen cover as a barrier to radon depends most strongly on its moisture content. Typical clay soils in the uranium milling regions of the west exhibit ambient moisture contents of 9% to 12%. For nonclay soils ambient moisture contents range from 6% to 10%. The following table provides, as an example, the cover thicknesses that would be required to reduce the radon emission to 20 pCi/m^2s for the above ranges of soil moisture. Three examples of tailings are shown that cover the probable extreme values of radon emission from bare tailings at the designated sites (100 to 1000 pCi/m^2s); the most common value is probably somewhat less than 500 pCi/m^2s.

Estimated Cover Thickness (meters) to Achieve 20 pCi/m²s

Radon emission from tailings (pCi/m s)	Percent moisture content of cover			
	6	8	10	12
300	1.7	1.3	1.0	0.7
500	3.4	2.6	2.0	1.5
1,000	4.1	3.2	2.4	1.8

These values are for simple homogeneous covers. In practice, multi-layer covers using clay next to the tailings can be used to significantly reduce the total thickness required.

Methods that control radon emissions will also prevent transport of particulates from the tailings pile to air or to surface water.[3] Similarily, permeable covers sufficiently thick for effective radon control will also absorb gamma radiation effectively (although thin impermeable covers will not).

Control of possible contamination of ground water is difficult. In the few cases where this is a potentially significant problem, clay liners and/or clay caps may provide a good degree of protection for at least many decades. However, more permanent protection may require removal to a site with more favorable hydrological, geochemical, or meteorological characteristics.

Very effective long-term inhibition of misuse by man, as well as of releases to air and surface water, could be achieved by burying tailings in deep mined cavities. In this case, however, direct contact with ground water would be difficult to avoid. The potential hazards of tailings could also be reduced by chemically processing them to remove contaminants. Such processes have limited efficiencies, however, so the residual tailings would still require control. Furthermore, the extracted substances (e.g., radium and thorium) would be concentrated, and would require further control.

We analyzed the costs of a number of possible control methods. The total cost is affected most strongly by the type of material used to stabilize the surface against erosion and inhibit misuse by man, by the water protection features required, and by the number of piles that must

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[3]However, recent studies suggest the possibility that some chemical processes in tailings piles could carry dissolved contaminants upward, perhaps even through earthen coverings. Control system designers must carefully consider this possibility.

be moved to new sites. In general, costs of covers using man-made materials (e.g., asphalt) are somewhat higher than costs for earthern covers. Active control measures are usually less costly in the short term than are passive measures. The costs for burial of tailings piles or for using chemical processing to extract radium (and perhaps other substances) are much higher than those for disposal using covers. We find that, given a decision to carry out any significant stabilization, the total cost of control using earthen covers does not depend strongly on the degree of reduction of radon emissions, for reductions by up to about a factor of 50 (the maximum that would probably be required at any site under these standards).

2. *Cleanup of Tailings.* The objective of cleanup of tailings from buildings is to reduce elevated indoor levels of radon decay products and gamma radiation. The objective of cleanup of tailings from land is to remove the potential for elevated levels of radon decay products in future buildings, and exposure of people to gamma radiation.

A variety of methods for cleanup of buildings are available. The most commonly used, and the most reliable and permanent measure, is to dig out the tailings and return them to the pile. This is sometimes relatively easy, such as removing tailings from outside footings, but may be very difficult, as in removing tailings from under a concrete slab floor in a finished room. Other methods include air filtration, improved ventilation, and the use of sealants to keep out radon.

Windblown tailings on lands around a tailings pile are usually removed by scraping off the top few inches of earth with earth-moving equipment and adding it to the pile. Land cleaned up in this way is relatively easily restored to close to background levels of radioactivity because windblown tailings are usually on the surface and easy to remove. Generally the cost is determined by the amount of land scraped, and not by the depth of scraping required. Alternatively, the land could be removed from productive use, access restricted, and the tailings fixed on the site by deep plowing.

When tailings have been removed from piles and misused in other ways, such as for soil conditioners in gardens and yards or as fill under detached buildings, the usual cleanup measure is to dig up the tailings and return them to the pile.

III. Resolution of Major Issues Raised in Public Comments

A. The Basis for the Standards

1. *Health Risk Models.* Some commenters considered that the models we used to estimate risks from breathing radon decay products underestimate the risk. More, however, argued that the models overestimate the risk. Some of these comments argued that the use of data on exposure of underground miners was not valid for estimating risks to the general public and suggested that we should use a lower risk estimate recently published as a contributed article in *Nature* (290:98, 1981).

We have reviewed the evidence presented and conclude that it does not support changing the risk models we have used. We agree that some evidence exists that risks may be either higher or lower than those we use, but, when all the available information is carefully considered, this evidence is not compelling. It is also true that the use of data on underground miners to predict risks to the general public is less than ideal; however, we have corrected for the most obvious difference (breathing rate) and do not believe this substantial body of evidence can be ignored. Finally, the estimates published in the article in *Nature* are not convincing. The upper limit of lung cancer risk given by these authors is apparently based on assuming that the total period of risk following exposure is only 15 years. However, the evidence from the Japanese A-bomb survivor data, the only large body of data for a general population, leads to use of a lifetime period of risk following exposure. Our detailed responses to these comments are presented in the FEIS.

2. *Cost Estimates.* Commenters suggested that our estimates of the costs to implement the standards were low

(by a factor of two or more) and that we had not included costs for engineering, field supervision, contingencies, or for reclamation of borrow pits from which cover material was obtained.

Many of these comments are correct. Our estimates in the DEIS were expressed in 1978 dollars. Costs of some construction activities have increased substantially between 1978 and 1982. We have revised our cost estimates to reflect these changes, and have also included previously omitted costs for engineering, field supervision, contingencies, and reclamation of borrow pits. We have analyzed specific estimates of the cost of meeting the proposed standards and find that our revised estimates are lower than those of the DOE, but in substantial agreement with those provided by industry and NRC. Our cost estimates are reported in detail in the FEIS.

3. *Cost-Benefit Analysis.* Commenters expressed the view that the cost of implementing the proposed standards will be high compared to the benefits, that we failed to carry out a cost-benefit analysis for these standards, or that we did not adequately consider alternatives to the standards proposed.

It is not possible to carry out a formal quantitative cost-benefit analysis for these standards. Many of the hazards reduced (or avoided) through their application (or through application of alternative standards) can neither be evaluated quantitatively nor restated in terms of a common index of value. The major hazard, the extent of possible future misuse of tailings by man, is almost impossible to quantify. A further complication is that the benefits of successful control accrue over a very long period of time, whereas the costs occur now. We can only roughly estimate how long control will last and how many cases of lung cancer might be avoided over the full term of effective control.

Instead of a quantitative cost-benefit analysis, we have cited examples of the impact of misuse and dispersal by wind and water in the FEIS, and have estimated the im-

pact of radon emissions from unstabilized piles. We have then estimated the extent to which these impacts might be avoided over the long term under realistic alternative standards, and made judgments about which alternatives offer the most cost-effective reduction of these impacts. The final standards are based on the results of such an analysis of alternatives, including a detailed consideration of their costs. This information is presented in Chapters 6 and 7 of the FEIS. Based on these analyses, we have made a number of changes (described in Sections B and C, below) to make the standards more cost-effective and easier to implement.

One notable conclusion from our analysis is that providing tailings piles with thick, durable covers costs surprisingly little more than applying minimal covers that will require maintenance and last a much shorter time. This conclusion follows from the large start-up expenditures related to managing the remedial program and undertaking any significant level of remedial work at mill sites. Thick covers offer greatly increased benefits from inhibiting misuse, controlling radon emissions, and increased longevity of the covers' effectiveness. For example, we estimate that the final control standard provides about ten times greater overall benefits than the lowest cost alternative standard, for only about 25 percent greater cost. Therefore, given that tailings piles will be stabilized under any of the alternatives we considered, we find it cost-effective to stabilize them well. This observation strongly influenced our choice of a radon release standard, as discussed in Section III.B.2, below.

Cost and benefit estimates for the alternative standards we considered are reported in detail in the FEIS; we briefly summarize here only our estimates for the final standards we selected.

Costs: We estimate the remedial action costs for mill sites and for off-site cleanup will be 158 and 38 million (1981) dollars, respectively. DOE has estimated its program development and management ("overhead") costs as

118 million (1981) dollars. These estimated total expenditures of 314 million (1981) dollars will occur over a period of seven years or more.

Benefits: We estimate benefits under the assumption, when appropriate, that tailings pile control systems will be partially effective longer than the standard requires. Control systems are required to be effective for as long as reasonably achievable up to 1000 years, but for not less than 200 years. Under this standard most of the 24 tailings pile will be stable against erosion and casual intrusion for misuse for much longer than 1000 years. Those few piles that are susceptible to flood damage will be protected for at least 200 years, and might not suffer real damage for much longer. During the period of full control, the maximum risk for individuals living very near a tailings pile from exposure to its radon emissions will be reduced by about 97%, from about 3 chances in 100 to about 1 chance in 1000. An estimated 200 potential premature deaths per century will be avoided initially, for a total of many thousands over the life of the cover. The potential for or existence of water contamination from tailings piles will be evaluated and any protective or remedial actions that the implementing agencies determine are warranted will be taken. We further estimate that about 60 premature deaths will be avoided by cleaning up contaminated buildings. An undeterminable additional number of deaths and the institutional burden of applying land-use controls may be avoided by cleaning up 1900 acres of land containing windblown tailings and about 3200-6500 additional locations where tailings have been brought for inappropriate uses.

4. *Scope of the Standards and the EIS.* Commenters expressed the view that some important impacts of mill tailings were not adequately considered in the DEIS and that we had not considered all of the available pertinent data. They cited inadequate consideration of (a) the health impacts of toxic elements, (b) radiation doses to man from the food pathway, and (c) the effects of radionuclides and toxic elements on plants and animals.

We have reviewed the available data on toxic elements in tailings and improved the FEIS in this respect (Appendix C). We have concluded that it is reasonable to expect that hazards from toxic elements will be adequately limited if control and cleanup are carried out according to these final standards. We have also reviewed the radiation doses from ingestion of food and confirmed our earlier conclusion that the risks from this pathway are small. We have not specifically required measures to protect animals and plants from the hazards of radioactivity, since we have concluded that the impacts are small.

Some comments expressed the view that the proposed standards were too narrow in scope to adequately protect public health. For example, it was proposed that the standards should include: Limits for radionuclide concentrations in air particulates and in vegetation; limits for toxic elements in soil; guidance for the interim period prior to remedial actions; and radiation protection criteria for workers who perform remedial actions.

We have considered these comments and believe that no changes are needed. If control and cleanup are carried out according to these final standards, the health impact from radionuclides in air and from food pathways, and from toxic elements in soil, which are already low, would be further mitigated. Workers are already protected under existing Federal Guidance for occupational radiation exposures. Finaily, the impacts that will occur prior to completion of remedial actions are sufficiently small that we do not believe special interim standards are justified.

B. The Standards for Control of Tailings Piles

1. *Longevity of the Control.* Some commenters expressed the view that the proposed requirement that stabilization and control last for at least 1000 years is unreasonable because events cannot be predicted over this period of time with sufficient certainty. They recommended a period of no more than 100 to 200 years, and that active institutional care, such as access control and periodic maintenance, be

permitted. Other commenters recommended that the longevity required should be greater than 1000 years, and expressed the view that a requirement for longevity of up to 10,000 years is practical.

We consider the single most important goal of control to be effective isolation and stabilization of tailings for as long a period of time as is reasonably feasible, because tailings will remain hazardous for hundreds of thousands of years. The longevity of tailings control is governed chiefly by the possibilty of intrusion by man and erosion by natural forces. Reasonable assurance of avoiding casual intrusion by man can be provided through the use of relatively thick and/or difficult-to-penetrate covers (such as soil, rock, or soil-cement). No standard can guarantee absolute protection against the purposeful works of man, and these standards do not require such protection. Protection against natural forces requires consideration of wind and surface water erosion, and of the possibility of flood damage. Wind and surface water erosion are relatively well-understood and predictable, and are easily inhibited through the use of rock or, in some cases, vegetative surface stabilization. Similarly, a body of scientific and engineering knowledge exists to predict the frequency and magnitude of floods for periods of many hundreds of years, and to provide the engineering controls to protect against such floods (including the possibility of moving a pile if this is more economical). We considered longevity requirements ranging from 100 to 10,000 years and have concluded that existing knowledge permits the design of control systems for these tailings that have a good expectation of lasting at least for periods of 1000 years. We recognize that it may not always be practical, however, to project such performance with a high degree of certainty, because of limited engineering experience with such long time periods.

We know no historical examples of societies successfully maintaining active care of decentralized materials through public institutions for periods extending to many hundreds or thousands of years. We have concluded that primary reliance on passive measures is preferable, since their long-

term performance can be projected with more assurance than that of measures which rely on institutions and continued expenditures for active maintenance. Section 104 of the Act requires the Federal Government to acquire and retain control of these tailings disposal sites under licenses issued by the Nuclear Regulatory Commission (NRC). The NRC is authorized to require performance of any maintenance, monitoring, and emergency measures that are needed to protect public health and safety. As long as the Federal Government exercises its ownership rights and other authorities regarding these sites, they should not be systematically exploited by people or severely degraded by natural forces.

We believe that these institutional provisions are essential to support any project whose objectives is as long term as are these disposal operations, and for which we have as little experience. This does not mean that we believe primary reliance should be placed on institutional controls; rather, that institutional oversight is an essential backup to passive control. We note, in this regard, that the remedial actions required by these standards would not make it safe to build habitable structures on the disposal sites. Federal ownership of the sites is assumed to preclude such inappropriate uses.

In the final standards we have modified the requirement for longevity of control so as to assure that it is practical for agencies to certify that the standards are implemented in all cases. We recognize that this is a remedial action program, that these sites were not chosen with long-term disposal in mind, and that our ability to predict the longevity of engineered designs is not always adequate to the task at hand. The proposed standard required a longevity of control of at least 1000 years. The final standard requires that control measures be carried out in a manner that provides reasonable assurance that they will last, to the extent reasonably achievable, up to 1000 years and, in any case, for a minimum of 200 years. The widely varying characteristics of the inactive sites, the uncertainties involved in projecting performance of control measures

over long periods of time, and the large costs involved in moving some tailings piles to provide a very high degree of assurance of longevity make this change appropriate. (We estimate up to 50 million dollars might be unnecessarily spent to move piles under the proposed requirement for a longevity of at least 1000 years.) The change does not signify that there are circumstances under which the term of protection contemplated by the proposed standards is not appropriate. The change merely acknowledges that implementing agencies may in some cases have difficulty certifying that control measures that are appropriate can reasonably be expected to endure without degradation for 1000 years. Man's ability to predict the future is notoriously limited. That fact, which on the one hand warrants our making responsible societal efforts to limit risk to future generations, also warrants our refraining from actions undertaken merely in the name of necessarily artificial levels of statistical certainty.

We selected this period of period of performance because we believe there is a reasonable expectation that readily achievable controls will remain effective for at least this period. However, we recognize that uncertainties increase significantly beyond a thousand years, and we conclude it would be unreasonable to require that assurance be provided that the controls will be effective for periods of up to 10,000 years.

2. *The Radon Release Limit.* Some commenters expressed the view that the proposed radon emission standard of 2 pCi/m^{2}s from the surface of a tailings pile was either unreasonably low or unnecessary. Others suggested that proper consideration of costs and benefits would lead to a higher standard, in the range of 40-100 pCi/m^{2}s. Some urged that the standards for radon be expressed as a limit on ambient air concentration at the site boundary, rather than as an emission limit. Others were concerned that the proposed level could not be reliably implemented, since it is close to background levels. Finally, many argued that radon emitted from tailings piles does not constitute a

guished from background radon levels a short distance from a tailings pile (i.e., 1/4 - 1/2 mile), and that, therefore, there is no need for a radon emission standard.

We believe that limiting radon emissions from tailings piles serves several necessary functions: reducing the risk to nearby individuals and individuals at greater distances; and furthering the goals of reliable long-term deterrence of misuse of tailings by man and control of erosion of piles by natural processes. The degree of reduction of radon emissions achieved by a disposal system is more or less directly related to the degree of abatement of each of these hazards.

Our analysis predicts significant risk to people living next to tailings piles, and field measurements confirm elevated levels of radon in air close to the piles. If radon emissions are not reduced, we estimate that individuals residing permanently near some of the piles could incur as much as three to four chances in a hundred of a fatal lung cancer in addition to normal expectations. The fact that increases in radon levels due to the piles cannot be distinguished relative to background levels further away from a pile does not mean that radon is not present or that there is no increased risk from this radon -- it merely means that measurements are not capable of unambiguously detecting such levels. Limiting radon release, therefore, not only benefits the nearby individual, but also reduces the adverse effects of radon well beyond the immediate vicinity of the site.

Radon emission was selected as the preferred quantity to be specified by the standard because, unlike ambient air concentration at the site boundary, it is directly related to the degree of radon control achieved. A site boundary standard would not necessarily require any control of radon emissions (since the boundary might be moved arbitrarily far from the pile), and, in any case, compliance would depend on indefinitely excluding public access across the boundary.

We have concluded that a limit on a radon emission is the most direct and appropriate means for furthering the Congressional objective of adequate and reliable long-term control of tailings. Such a limit assures a sufficient earthen cover (or its equivalent) to provide an acceptable degree of stabilization and isolation of the tailings over a long period of time. Congress did not intend that EPA set standards for one generation only, or that it set standards without consideration of the long-term reliability of whatever means are available for implementing them. (Similarly, Congress anticipated that short-term institutional controls would not provide the primary basis for protection.) Although the implementing agencies will decide which specific controls to employ, this does not preclude our considering, in accordance with Congress' directive, the effect of a particular choice of a numerical limit on the maintenance of future control. Therefore, in selecting the value for radon emissions, an important consideration was that the standard promote the objectives of adequate isolation and stabilization to control both intrusion by man and erosion by natural forces.

We have reevaluated the costs and benefits of alternative standards and have revised the radon emission standard to 20 pCi/m^{2}s, in part because we concluded that the incremental benefits of the proposed standards are not justified by the increased costs, and in part because recent results of tests of covers indicate that a 2 pCi/m^{2}s standard may be more difficult to achieve than we originally believed. The specific alternatives we analyzed are described in detail in the FEIS. They ranged from controlling emissions to 2 pCi/m^{2}s to providing only a minimal cover that we estimate would, on the average, reduce total radon emissions by half (to final values ranging from 40 pCi/m^{2}s to 500 pCi/m^{2}s, depending upon the site.) Estimated disposal costs for these options (excluding DOE overhead and the cost of moving piles) range from 50 to 195 million dollars. The costs for the revised standard of 20 pCi/m^{2}s were estimated as 95 million dollars; this is approximately 45 million dollars less than for the proposed standard.

We have concluded that this revised standard will provide excellent protection of public health, safety, and the environment. Control measures designed to meet this standard will prevent misuse and protect piles from erosion by providing adequate isolation of tailings. The standard provides more than 96% of the reduction of the potential for lung cancer from radon emissions provided by the proposed standard. Under the revised emission limit, the excess risk to the most exposed individual would be reduced to a few chances in a thousand. In addition, it provides this protection at a substantial cost reduction compared to the originally proposed standard (including the modification of the longevity requirement, the combined saving is approximately 95 million dollars). The revised emission limit should also be high enough to remove any concern associated with confusing radon from tailings with radon emitted from normal soils (typically up to 1 pCi/m^2s), and can be readily achieved through the use of a wider variety of earthen materials than the proposed standards.

We conclude from our analysis that a higher emission standard, such as 100 pCi/m^2s, would not achieve the above objectives to an acceptable degree. It would result in a five times greater risk to individuals living near a tailings pile and a similar increase in the impact from radon emissions on local, regional, and national populations (to 20% of the total risk from uncontrolled piles). The control measures required to meet such a less restrictive standard would provide significantly less isolation against intrusion and protection against erosion. The further cost reduction compared to the final standard would be relatively small (approximately 20 million dollars).

The Department of Energy, in the course of the consultations that Section 206 of the Act requires before we promulgate final standards, expressed its strong preference for an ambient air concentration standard rather than an emission standard. Therefore, through calculations described in the FEIS, we determined an alternative standard expressed as a radon concentration at the *edge of the tailings* that we believe would require basically the same

level of control as the 20 pCi/m²s emission standard. Applying a concentration standard at the edge of the tailings resolves our concerns about applying it at a site boundary. A limit applied at a site boundary would permit varying effectiveness of cover, depending on the choice of location of the boundary, and compliance would depend on indefinite maintenance of the boundary. However, a radon concentration standard at any position that is defined in terms of its relation to the tailings has a fixed relationship to radon releases and compliance does not depend on institutional maintenance of a fence.

Calculations can be used to estimate the values of the annual average radon concentrations at various distances from tailings piles with a given emission rate. Considering the uncertainties in such calculations, we are confident that designing control systems to keep the maximum annual average radon concentration at the edges of the tailings below 0.5 pCi/1 will provide approximately the same overall health protection as designing them for an average emission rate of 20 pCi/m²s. Under either form of the radon limit the radon concentration due to a pile will be well below the background level at any residence near the disposal site. The final standard contains both forms of radon limit, as approximately equivalent alternatives.

3. *Avoiding Contamination of Water.* Commenters expressed concern that the proposed requirements for protection of water are unnecessarily restrictive, are impractical or too costly to implement, or incorporate numerical values that had not been adequately justified. Some argued that water protection should be handled on a site-specific basis, that general standards were not necessary, and that water quality standards were not an appropriate basis for these regulations. Other comments expressed the opposite view that the proposed standards did not provide sufficient protection, that already degraded ground water should be cleaned up, or that numerical values should be included for additional toxic elements.

We have carefully reviewed available data on contamination of ground water at the designated sites. Studies of

these sites are not yet conclusive, but they provide little evidence of recent movement of contaminants into ground water, and there is some evidence that the geochemical setting may inhibit contaminants from entering usable ground water at two sites where there might otherwise be a problem (Salt Lake City and Canonsburg). The proposed standards might be difficult to implement at certain sites because our ability to perform definitive hydrological assessments is limited. That is, they could lead to decisions to use very expensive control methods, such as moving piles to new sites and installing liners, even though no substantial threat to ground water is demonstrated. We also believe that minor degradation of ground water may be acceptable, such as for water of already inadequate quality for existing or probable uses, or for very small aquifers.

Finally, we agree that there is uncertainty associated with the appropriateness of both the toxic elements selected and the numerical values specified in the proposed standards, which were drawn mainly from existing national water quality standards for surface water and public drinking water supplies.

In summary, although a few sites appear to have some existing ground water contamination, probably due to dewatering of process liquids from the tailings, we believe there is a low probability of additional contamination at most of the sites. The remedial program should provide for adequate hydrological and geochemical surveys of each site as a basis for determining whether specific water protection or cleanup measures should be applied. Whether or not it is feasible or practical to restore an aquifer and to what degree will depend on site-specific factors, including the aquifer's hydrogeologic setting, the cost, the present and future value of the aquifer as a water resource, the availability of alternative supplies, and the degree to which human exposure is likely to occur.

We do not believe that the existing evidence indicates that ground water contamination from inactive mill tailings

is or will be a matter of regulatory concern. We have decided, therefore, not to establish general substantive standards on this subject. Should evidence be found that shows that this judgment is in error, we will consider the need for further rulemaking procedures.

A possible alternative to the above course of action is for us to establish a general regulatory mechanism for others to use in deciding, on a site-specific basis, whether a ground water problem exists and, if so, what remedial action is appropriate. Such a nonsubstantive, or procedural, mechanism would resemble that established by our regulations implementing the Solid Waste Disposal Act, as amended (47 FR 32274, July 26, 1982). In this connection, the Uranium Mill Tailings Radiation Control Act reflects the desire of Congress (in Section 206) that EPA's standards be consistent, to the maximum extent practicable, with the Solid Waste Disposal Act. It also requires NRC to concur in DOE's remedial actions at each site (in Section 108) and to issue licenses for these sites (in Section 104) that may encompass any ". . . monitoring, maintenance, or emergency measures necessary to protect public health and safety." These functions are consistent with those embodied in EPA's above-referenced regulations. We have decided not to adopt this alternative, because we believe that the devising of any necessary such mechanisms for application under this Act can more appropriately be left to the NRC and DOE.

If any existing contamination or potential for future ground water contamination is present we have provided, therefore, in the implementation section of these standards, that judgments on the possible need for monitoring or remedial actions should be guided by relevant considerations described in EPA's hazardous waste management system, and by relevant State and Federal Water Quality Criteria for existing and anticipated uses of the aquifer. Decisions to undertake remediation should consider the costs and benefits of possible remedial and control measures, including the extent and usefulness of the aquifer. We have also concluded that the same approach is appro

priate to surface water, which should be adequately protected in any case by any control measures meeting the standards for longevity and radon emission.

C. The Standards for Cleanup of Tailings

1. *Radium-226 in Soil.* Comments about the cleanup standard for radium-226 in soil dealt primarily with the proposed numerical value of the standard and perceived difficulty of measurement to show conformance. Many comments expressed the view that there was no justification for a standard as low as 5 pCi/g and that a higher value would be most cost-effective. Recommended values ranged from 10-30 pCi/g.

The purpose of this standard is to limit the risk from inhalation of radon decay products in houses built on land contaminated with tailings, and to limit gamma radiation exposure of people using contaminated land. We estimate that each increase of 0.01 WL inside a house increases the risk of lung cancer to each of its inhabitants by something like one-half to one in a hundred, for an assumed lifetime of residency. The infiltration of radon in soil gas directly into a house is by far the largest contributor to indoor radon, and we estimate that soil extensively contaminated at a level of 5 pCi/g radium can readily lead to indoor levels of radon decay products of 0.02 WL. Because the risks from soils contaminated with radium-226 are potentially so great, the proposed standard was set at a level as close to background as we believed reasonable, taking into consideration the difficulties in measuring this level and distinguishing it from natural background.

We have examined the costs and benefits of alternative standards ranging from 5 to 30 pCi/g. These are described in detail in the FEIS. Total cleanup costs are less than 10% to 20% of the total costs of disposal of tailings piles for all the alternatives considered. Costs for cleanup of windblown tailings from land surfaces are sensitive to the standard, because the area to be cleaned up varies approximately inversely with the limit selected. Costs for

removal of buried tailings are not sensitive to the standard, since the amount to be removed varies only slightly with the limit selected. That is, we concluded most buried tailings would be removed under any of the alternatives considered. We also considered the difficulty of measuring various thicknesses of surface contamination, and in identifying and measuring contamination due to buried tailings. Detection of buried tailings could be difficult. However, buried tailings, as opposed to surface contamination (usually windblown and diluted with soil), can be effectively located using a higher detection limit than the proposed standard of 5 pCi/g. Based on these analyses, we have modified the standard for surface contamination of soil (5 pCi/g) from an average over the top 5 cm of soil to an average over the top 15 cm of soil; and revised the standard for subsurface contamination from 5 pCi/g to 15 pCi/g (still averaged over any 15 cm layer of soil). We believe these standards will result in essentially the same degree of cleanup, and will be simpler to implement. For tailings transported by man to off-site properties, the hazard varies with the amount of tailings involved and their location. The proposed standard did not provide for exemption of locations posing a low hazard. The final standard requires cleanup of contamination only when the amount and location of tailings poses a clear present or future hazard, and provides criteria to assist this determination. We estimate that perhaps more than half of the identified locations of such contamination do not present a hazard sufficient to warrant cleanup, at an estimated saving of 24 million dollars.

Some comments expressed the view that measuring radium-226 and distinguishing residual radioactive materials from natural background at the levels proposed would be difficult and costly, and that many samples would have to be collected and analyzed to show compliance with the standards. The changes we have made make determination of compliance with the standard easier and less costly. In addition, we have provided guidance in this Notice and the FEIS on implementation of the standards, to clarify

our intent that unnecessarily stringent (and costly) verification that the standards have been achieved should be avoided.

2. *Radon Decay Products in Buildings.* Some comments expressed the view that the proposed indoor radon decay product standard of 0.015 WL would be difficult and costly to implement, because it is within the upper range of levels that commonly occur in houses due to natural causes. For example, it might be necessary to distinguish whether the standard is exceeded because of the presence of tailings or because of anomalies in the natural background. This could result in costly and unnecessary remedial actions, or in the frequent use of an exceptions procedure. These comments recommended that we raise this standard to a more cost-effective value that can be more easily distinguished from naturally-occurring levels.

We have considered these arguments and re-examined the costs and benefits of alternative standards. We used the data from the Grand Junction, Colorado, remedial program for contaminated buildings to assist this evaluation. Reduction of radon decay products in existing buildings is probably the most cost-effective of all types of remedial actions for tailings, because the high risk associated with indoor radon decay products. Based on these evaluations, the standard has been revised upward only slightly so as to facilitate implementation and to more closely conform to other related standards. Under the final standard the objective of remedial actions is to achieve an indoor radon decay product concentration of 0.02 WL. For circumstances where remedial action has been performed and it would be unreasonably difficult and costly to reduce the level below 0.03 WL, the remedial action may be terminated at this level without a specific finding of the need for an exception. However, we have also sought to avoid excessive costs by encouraging the use of active measures (such as heat exchangers, air cleaners, and sealants) to meet the objective of 0.02 WL when further removal of tailings to achieve levels below 0.03 WL is impractical. We believe the final standard deals adequately with complications in-

troduced by the presence of any high concentration of naturally-occurring radionuclides, and avoids unnecessary and costly remedial actions that produce only marginal improvements.

D. Reducing Regulatory Burdens.

Some commenters suggested that the proposed standards should be flexible to take account of unusual circumstances, site-specific factors, and any complications due to high natural background levels. These commenters recommended that this be accomplished by raising the numerical limits, establishing different standards for unusual circumstances, or by expressing the standards as a range of values.

We agree that it is appropriate and desirable to take into account, as far as practical, different circumstances. In addition, we believe that regulations should be easy to carry out and not contain unnecessary procedural requirements. We have encouraged the implementing agencies to do this in our "Guidance for Implementation" as described below. We have also changed the procedures for situations in which it would be unreasonable to satisfy the standards from an "exceptions" process to one in which the implementing agencies apply "Supplemental Standards." This is also described below. Finally, the numerical limits of some of the standards have been raised; this will assure that they are more readily distinguishable from background levels.

IV. Implementation.

The Act requires the Secretary of Energy to select and perform the remedial actions needed to implement these standards, with the full participation of any State that shares the cost, with the concurrence of the Nuclear Regulatory Commission, and in consultation, when appropriate, with affected Indian tribes and the Secretary of the Interior.

The cost of remedial action will be borne by the Federal Government and the States as prescribed by the Act. Con-

trol and stabilization remedial activities are large scale undertakings for which there is relatively little experience. Although preliminary engineering assessments have been performed, specific engineering requirements and costs to meet the standards at each site have yet to be determined. We believe control and stabilization costs (including DOE overhead) averaging about 10-12 million (1981) dollars per tailings pile are most likely. For some sites, this cost may be partly offset by recovered land values or through provisions of the Act for recovery of uranium or other minerals through reprocessing the tailings prior to performing remedial actions.

A. Guidance for Implementation

Conditions at the inactive processing sites vary greatly, and engineering experience with some of the required remedial actions is limited. It is our objective that implementation of these standards be consistent with the assumptions we have made in deriving them. We are therefore providing "Guidance for Implementation" to avoid needless expense which may result from uncertainty or confusion as to what level of protection the standards are intended to achieve.

The standard for control and stabilization of tailings piles is primarily intended as a design standard. Implementation will require a judgment that the method chosen provides a reasonable expectation that the provisions of the standard will be met, to the extent reasonably achievable, for up to 1000 years, and, in any case, for at least 200 years. This judgment will necessarily be based on site-specific analyses of the properties of the sites, candidate control systems, and the potential effects of natural processes over time, and, therefore, the measures required to satisfy the standard will vary from site to site. We expect that computational models, theories, and expert judgment will be the major tools in deciding that a proposed control system will adequately satisfy the standard. Post-remediation monitoring will not be required to show compliance,

environment. Costs incurred by remedial actions should be directed toward this purpose. We intend the standards to be implemented using search and verification procedures whose cost and technical requirements are reasonable. For example, since we intend the cleanup standards for buildings to protect people, measurements in such locations as small crawl spaces and furnace rooms may often be inappropriate. Remedial action decisions should be based on radiation levels in the parts of buildings where people spend substantial amounts of time. The standards for cleanup of land are designed to limit the exposure of people to gamma radiation, and to limit the level of radon decay products in buildings that might later be built on the land. In most circumstances, no significant harm would be caused by not cleaning up small areas of land contaminated by tailings. Similarly, it would be unreasonable to require expensive detailed proof that all the tailings below the surface of open lands had been removed. Procedures that provide a reasonable assurance of compliance with the standards will be adequate. Where measurements are necessary to determine compliance with the cleanup standards, they should be performed within the accuracy of presently available field and laboratory measurement capabilities and in conjunction with reasonable survey and sampling procedures designed to minimize the cost of verification. We are confident that DOE and NRC, in consultation with EPA and the States, will adopt implementation procedures consistent with our intent in establishing these standards.

B. Supplemental Standards

The varied conditions at the designated sites and limited experience with remedial actions make it appropriate that EPA allow adjustment of the standards where circumstances require. We believe that, in most cases, our final standards are adequately protective and can be implemented at reasonable cost. However, the standards could be too strict in some applications. We anticipate that such circumstances might occur. We originally proposed to deal with this through an "exceptions" procedure which would relax standards when certain criteria were satisfied. We

agree with the comments, however, that the proposed procedure was unnecessarily burdensome to apply.

In the final regulations we have eliminated this procedure and replaced it with a simplified procedure for applying "supplemental standards." This is a more effective means of accomplishing our original purpose. An additional significant change in the proposed criteria for exceptions is the addition of criterion 192.21(c), which relaxes the requirement for cleanup of land at off-site locations when residual radioactive materials are not clearly hazardous and cleanup costs are unreasonably high. This category of contamination was not adequately addressed in the proposals.

Regulatory Impact Analysis

Under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. That order requires such an analysis if the regulations would result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This regulation is not Major, because we expect the costs of the remedial action program in any calendar year to be less than $100 million; States bear only 10% of these costs and there are no anticipated major effects on costs or prices for others; and we anticipate no significant adverse effects on domestic or foreign competition, employment, investment, productivity, or innovation. The costs of these standards are discussed in the FEIS.

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291.

This regulation will not have a significant effect on a substantial number of small entities, as specified under Section 605 of the Regulatory Flexibility Act, because there are no small entities subject to this regulation.

Dated: December 15, 1982.
Anne M. Gorsuch,

Administrator.

List of Subjects in 40 CFR Part 192

Environmental protection; Radiation protection; Uranium.

In 40 CFR Chapter I, Part 192 is revised to read as follows:

PART 192 -- HEALTH AND ENVIRONMENTAL PROTECTION STANDARDS FOR URANIUM MILL TAILINGS

Subpart A -- Standards for the Control of Residual Radioactive Materials from Inactive Uranium Processing Sites

Sec.
192.00 Applicability.
192.01 Definitions.
192.02 Standards.

Subpart B -- Standards for Cleanup of Land and Buildings Contaminated with Residual Radioactive Materials from Inactive Uranium Processing Sites

192.10 Applicability.
192.11 Definitions.
192.12 Standards.

Subpart C -- Implementation

192.20 Guidance for implementation.
192.21 Criteria for applying supplemental standards.
192.22 Supplemental standards.
192.23 Effective date.

Authority: Section 275 of the Atomic Energy Act of 1954, 42 U.S.C. 2022, as added by the Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. 95-604.

Subpart A -- Standards for the Control of Residual Radioactive Materials from Inactive Uranium Processing Sites

§ 192.00 Applicability

This subpart applies to the control of residual radioactive material at designated processing or depository sites under Section 108 of the Uranium Mill Tailings Radiation Control Act of 1978 (henceforth designated "the Act"), and to restoration of such sites following any use of subsurface minerals under Section 104(h) of the Act.

§ 192.01 Definitions

(a) Unless otherwise indicated in this subpart, all terms shall have the same meaning as in Title I of the Act.

(b) *Remedial* action means any action performed under Section 108 of the Act.

(c) *Control* means any remedial action intended to stabilize, inhibit future misuse of, or reduce emissions or effluents from residual radioactive materials.

(d) *Disposal site* means the region within the smallest perimeter of residual radioactive material (excluding cover materials) following completion of control activities.

(e) *Depository site* means a disposal site (other than a processing site) selected under Section 104(b) or 105(b) of the Act.

(f) *Curie* (Ci) means the amount of radioactive material that produces 37 billion nuclear transformation per second. One picocurie (pCi) = 10^{-12}Ci.

§ 192.02 Standards

Control shall be designed[4] to:

(a) Be effective for up to one thousand years, to the extent reasonably achievable, and, in any case, for at least 200 years, and,

(b) Provide reasonable assurance that releases of radon-222 from residual radioactive material to the atmosphere will not:

(1) Exceed an average[5] release rate of 20 picocuries per square meter per second, *or*

(2) Increase the annual average concentration of radon-222 in air at or above any location outside the disposal site by more than one-half picocurie per liter.

Subpart B -- Standards for Cleanup of Land and Buildings Contaminated with Residual Radioactive Materials from Inactive Uranium Processing Sites

§ 192.10 Applicability

This subpart applies to land and buildings that are part of any processing site designated by the Secretary of Energy under Section 102 of the Act. Section 101 of the Act, states, in part, that "processing site" means --

(a) Any site, including the mill, containing residual radioactive materials at which all or substantially all of the uranium was produced for sale to any Federal agency prior to January 1, 1971, under a contract with any Federal agency, except in the case of a site at or near Slick Rock, Colorado, unless --

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[4]Because the standard applies to design, monitoring after disposal is not required to demonstrate compliance.

[5]This average shall apply over the entire surface of the disposal site and over at least a one-year period. Radon will come from both residual radioactive materials and from materials covering them. Radon emissions from the covering materials should be estimated as part of developing a remedial action plan for each site. The standard, however, applies only to emissions from residual radioactive materials to the atmosphere.

(1) Such site was owned or controlled as of Januray 1, 1978, or is thereafter owned or controlled, by any Federal agency, or

(2) A license (issued by the (Nuclear Regulatory) Commission or its predecessor agency under the Atomic Energy Act of 1954 or by a State as permitted under Section 274 of such Act) for the production at site of any uranium or thorium product derived from ores is in effect on January 1, 1978, or is issued or renewed after such date; and

(b) Any other real property or improvement thereon which --

(1) Is in the vicinity of such site, and

(2) Is determined by the Secretary, in consultation with the Commission, to be contaminated with residual radioactive materials derived from such site.

§ 192.11 Definitions

(a) Unless otherwise indicated in this subpart, all terms shall have the same meaning as defined in Title I of the Act or in Subpart A.

(b) "Land" means any surface or subsurface land that is not part of a disposal site and is not covered by an occupiable building.

(c) "Working Level" (WL) means any combination of short-lived radon decay products in one liter of air that will result in the ultimate emission of alpha particles with a total energy of 130 billion electron volts.

(d) "Soil" means all unconsolidated materials normally found on or near the surface of the earth including, but not limited to, silts, clays, sands, gravel, and small rocks.

§ 192.12 Standards

Remedial actions shall be conducted so as to provide reasonable assurance that, *as a result of residual radioactive materials from any designated processing site:*

(a) The concentration of radium-226 in land averaged over any area of 100 square meters shall not exceed the background level by more than --

(1) 5 pCi/g, averaged over the first 15 cm of soil below the surface, and

(2) 15 pCi/g, averaged over 15 cm thick layers of soil more than 15 cm below the surface.

(b) In any occupied or habitable building --

(1) The objective of remedial action shall be, and reasonable effort shall be made to achieve, an annual average (or equivalent) radon decay product concentration (including background) not to exceed 0.02 WL. In any case, the radon decay product concentration (including background) shall not exceed 0.03 WL, and

(2) The level of gamma radiation shall not exceed the background level by more than 20 microroentgens per hour.

Subpart C -- Implementation
§ 192.20 Guidance for implementation

Section 108 of the Act requires the Secretary of Energy to select and perform remedial actions with the concurrence of the Nuclear Regulatory Commission and the full participation of any State that pays part of the cost, and in consultation, as appropriate, with affected Indian Tribes and the Secretary of the Interior. These parties, in their respective roles under Section 108, are referred to hereafter as "the implementing agencies." The implementing agencies shall establish methods and procedures to provide "reasonable assurance" that the provisions of Subparts A and B are satisfied. This should be done as appropriate through use of analytic models and site-specific analyses, in the case of Subpart A, and for Subpart B through measurements performed within the accuracy of currently available types of field and laboratory instruments in conjunction with reasonable survey and sampling procedures. These methods and procedures may be varied to suit conditions at specific sites. In particular:

(a)(1) The purpose of Subpart A is to provide for long-term stabilization and isolation in order to inhibit misuse and spreading of residual radioactive materials, control releases of radon to air, and protect water. Subpart A may be implemented through analysis of the physical properties of the site and the control system and projection of the effects of natural processes over time. Events and processes that could significantly affect the average radon release rate from the entire disposal site should be considered. Phenomena that are localized or temporary, such as local cracking or burrowing of rodents, need to be taken into account only if their cumulative effect would be significant in determining compliance with the standard. Computational models, theories, and prevalent expert judgment may be used to decide that a control system design will satisfy the standard. The numerical range provided in the standard for the longevity of the effectiveness of the control of residual radioactive materials allows for consideration of the various factors affecting the longevity of control and stabilization methods and their costs. These factors have different levels of predictability and may vary for the different sites.

(2) Protection of water should be considered in the analysis for reasonable assurance of compliance with the provisions of § 192.02. Protection of water should be considered on a case-specific basis, drawing on hydrological and geochemical surveys and all other relevant data. The hydrologic and geologic assessment to be conducted at each site should include a monitoring program sufficient to establish background ground water quality through one or more upgradient wells, and identify the presence and movement of plumes associated with the tailings piles.

(3) If contaminants have been released from a tailings pile, an assessment of the location of the contaminants and the rate and direction of movement of contaminated ground water, as well as its relative contamination, should be made. In addition, the assessment should identify the attenuative capacity of the unsaturated and saturated zone to determine the extent of plume movement. Judgments

on the possible need for remedial or protective actions for groundwater aquifers should be guided by relevant considerations described in EPA's hazardous waste management system (47 FR 32274, July 26, 1982) and by relevant State and Federal Water Quality Criteria for anticipated or existing uses of water over the term of the stabilization. The decision on whether to institute remedial action, what specific action to take, and to what levels an aquifer should be protected or restored should be made on a case-by-case basis taking into account such factors as technical feasibility of improving the aquifer in its hydrogeologic setting, the cost of applicable restorative or protective programs, the present and future value of the aquifer as a water resource, the availability of alternative water supplies, and the degree to which human exposure is likely to occur.

(b)(1) Compliance with Subpart B, to the extent practical, should be demonstrated through radiation surveys. Such surveys may, if appropriate, be restricted to locations likely to contain residual radioactive materials. These surveys should be designed to provide for compliance averaged over limited areas rather than point-by-point compliance with the standards. In most cases, measurement of gamma radiation exposure rates above and below the land surface can be used to show compliance with § 192.12(a). Protocols for making such measurements should be based on realistic radium distributions near the surface rather than extremes rarely encountered.

(2) In § 192.12(a), "background level" refers to the native radium concentration in soil. Since this may not be determinable in the presence of contamination by residual radioactive materials, a surrogate "background level" may be established by simple direct or indirect (e.g., gamma radiation) measurements performed nearby but outside of the contaminated location.

(3)Compliance with § 192.12(b) may be demonstrated by methods that the Department of Energy has approved for use under Pub. L. 92-314 (10 CFR 712), or by other methods that the implementing agencies determine are ade-

quate. Residual radioactive materials should be removed from buildings exceeding 0.03 WL so that future replacement buildings will not pose a hazard [unless removal is not practical -- see § 192.21(c)]. However, sealants, filtration, and ventilation devices may provide reasonable assurance of reductions from 0.03 WL to below 0.02 WL. In unusual cases, indoor radiation may exceed the levels specified in § 192.12(b) due to sources other than residual radioactive materials. Remedial actions are not required in order to comply with the standard when there is reasonable assurance that residual radioactive materials are not the cause of such an excess.

§ 192.21 Criteria for applying supplemental standards

The implementing agencies may (and in the case of Subsection (f) shall) apply standards under § 192.22 in lieu of the standards of Subparts A or B if they determine that any of the following circumstances exists:

(a) Remedial actions required to satisfy Subparts A or B would pose a clear and present risk of injury to workers or to members of the public, notwithstanding reasonable measures to avoid or reduce risk.

(b) Remedial actions to satisfy the cleanup standards for land, § 192.12(a), or the acquisition of minimum materials required for control to satisfy § 192.02(b), would, notwithstanding reasonable measures to limit damage, directly produce environmental harm that is clearly excessive compared to the health benefits to persons living on or near the site, now or in the future. A clear excess of environmental harm is harm that is long-term, manifest, and grossly disproportionate to health benefits that may reasonably be anticipated.

(c) The estimated cost of remedial action to satisfy § 192.12(a) at a "vicinity" site (described under Sec. 101(6)(B) of the Act) is unreasonably high relative to the long-term benefits, and the residual radioactive materials do not pose a clear present or future hazard. The likelihood that buildings will be erected or that people will spend long periods

of time at such a vicinity site should be considered in evaluating this hazard. Remedial action will generally not be necessary where residual radioactive materials have been placed semi-permanently in a location where site-specific factors limit their hazard and from which they are costly or difficult to remove, or where only minor quantities of residual radioactive materials are involved. Examples are residual radioactive materials under hard surface public roads and sidewalks, around public sewer lines, or in fence post foundations. Supplemental standards should not be applied at such sites, however, if individuals are likely to be exposed for long periods of time to radiation from such materials at levels above those that would prevail under § 192.12(a).

(d) The cost of a remedial action for cleanup of a building under § 192.12(b) is clearly unreasonably high relative to the benefits. Factors that should be included in this judgment are the anticipated period of occupancy, the incremental radiation level that would be affected by the remedial action, the residual useful lifetime of the building, the potential for future construction at the site, and the applicability of less costly remedial methods than removal of residual radioactive materials.

(e) There is no known remedial action.

(f) Radionuclides other than radium-226 and its decay products are present in sufficient quantity and concentration to constitute a significant radiation hazard from residual radioactive materials.

§ 192.22 Supplemental standards

Federal agencies implementing Subparts A and B may in lieu thereof proceed pursuant to this section with respect to generic or individual situations meeting the eligibility requirements of § 192.21.

(a) When one or more of the criteria of § 192.21(a) through (e) applies, the implementing agencies shall select and perform remedial actions that come as close to meet-

ing the otherwise applicable standard as is reasonable under the circumstances.

(b) When § 192.21(f) applies, remedial actions shall, in addition to satisfying the standards of Subparts A and B, reduce other residual radioactivity to levels that are as low as is reasonably achievable.

(c) The implementing agencies may make general determinations concerning remedial actions under this Section that will apply to all locations with specified characteristics, or they may make a determination for a specific location. When remedial actions are proposed under this Section for a specfic location, the Department of Energy shall inform any private owners and occupants of the affected location and solicit their comments. The Department of Energy shall provide any such comments to the other implementing agencies. The Department of Energy shall also periodically inform the Environmental Protection Agency of both general and individual determinations under the provisions of this section.

§ 192.23 Effective date.

Subparts A, B, and C shall be effective March 7, 1983.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 192

[AD-FRL-2431-8]

Environmental Standards for Uranium and Thorium Mill Tailings at Licensed Commercial Processing Sites

AGENCY: Environmental Protection Agency

ACTION: Final rule.

SUMMARY:

These are final health and environmental standards to govern stabilization and control of byproduct materials (primarily mill tailings) at licensed commercial uranium and thorium processing sites. These standards were developed pursuant to Section 275 of the Atomic Energy Act (42 U.S.C. 2022), as added by Section 206 of Pub. L. 95-604, the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA).

The standards apply to tailings at locations that are licensed by the Nuclear Regulatory Commission (NRC) or the States under Title II of the UMTRCA. The standards for disposal of tailings require stabilization so that the health hazards associated with tailings will be controlled and limited for at least one thousand years. They require that disposal be designed to limit releases of radon to 20 picocuries per square meter per second, averaged over the surface of the disposed tailings, and require measures to avoid releases of radionuclides and other hazardous substances from tailings to water. The standards for tailings at operating mills, prior to final disposal, add two elements and a measure of radioactivity to the ground water protection requirements now specified under the Solid Waste Disposal Act, as amended. Existing EPA regulations and Federal Radiation Protection Guidance currently applicable to tailings remain unchanged. The Agency will monitor continuing development of technical and economic information as the Department of Energy proceeds with dis-

posal of the inactive tailings piles, and revise these standards if this information suggests that modifications are warranted.

This notice summarizes the comments received on proposed standards published on April 29, 1983, and provides a summary of the Agency's consideration of major comments. Detailed responses to comments are contained in the Final Environmental Impact Statement.

DATE: These final standards take effect on December 6, 1983.

ADDRESSES: *Background Documents* -- Background information is given in the Final Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Ore Processing (40 CFR Part 192), EPA 520/1-83-008 (FEIS) and the Regulatory Inpact Analysis of Environmental Standards for Uranium Mill Tailings at Active Sites, EPA 520/1-83-010 (RIA). Single copies of the FEIS and the RIA, as available, may be obtained from the Program Management Office (ANR-458), Office of Radiation Programs, U.S. Environmental Protection Agency, Washington, D.C. 20460; telephone number (703) 557-9351.

Docket: Docket Number A-82-26 contains the rulemaking record. The docket is available for public inspection between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section (LE-130), West Tower Lobby, Gallery I, 401 M Street, SW., Washington, D.C. 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT:
Mr. Jack Russell, Guides and Criteria Branch (ANR-460), Office of Radiation Programs, U.S. Environmental Protection Agency, Washington, D.C. 20460; telephone number (703) 557-8224.

SUPPLEMENTARY INFORMATION:

I. Introduction

On November 8, 1978, Congress enacted Pub. L. 95-604, the Uranium Mill Tailings Radiation Control Act of

1978 (henceforth designated "UMTRCA"). In the Act, Congress stated its finding that uranium mill tailings "* * * may pose a potential and significant radiation health hazard to the public, * * * and * * * that every reasonable effort should be made to provide for stabilization, disposal, and control in a safe and environmentally sound manner of such tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings." The Administrator of the Environmental Protection Agency (EPA) was directed to set "* * * standards of general application for the protection of the public health, safety, and the environment * * *" to govern this process of stabilization, disposal, and control.

UMTRCA established two programs to protect public health, safety, and the environment from uranium mill tailings, one for certain designated sites which are now inactive (i.e., at which all milling has stopped and which are not under license) and another for active sites (those sites licensed by the Nuclear Regulatory Commission (NRC) or the State in which the site is located, when this State is an Agreement State of the NRC under Section 274 of the Atomic Energy Act).

Tailings at the inactive uranium milling sites are defined in UMTRCA as residual radioactive materials. The program for inactive sites covers the disposal of tailings and the cleanup of onsite and offsite locations contaminated with tailings. Final cleanup and disposal standards for the inactive sites were published by EPA on January 5, 1983 (48 FR 590). The U.S. Department of Energy (DOE) is responsible for carrying out these activities in conformance with these standards, with the concurrence of the NRC, and in cooperation with the States.

Tailings at active uranium milling sites are defined in UMTRCA as uranium byproduct materials. The program for active sites covers the final disposal of tailings and the control of effluents and emissions during and after milling operations. UMTRCA requires EPA to establish standards

for this program, and that standards for nonradioactive hazards protect human health and the environment in a manner consistent with standards established under Subtitle C of the Solid Waste Disposal Act, as amended (SWDA). The NRC or the licensing Agreement State is responsible for assuring compliance with the standards at active mill sites.

On January 4, 1983, Congress amended UMTRCA to provide additional guidance on the matters to be considered in establishing these standards and to establish new deadlines for their promulgation: "In establishing such standards, the Administrator shall consider the risk to the public health, safety, and the environment, the environmental and economic costs of applying such standards, and such other factors as the Administrator determines to be appropriate." The Act (Pub. L. 96-415) established a deadline of October 1, 1983 for promulgation of the standards. These final standards conform to the above requirements.

II. Summary of the Final Rule

This final rule modifies and clarifies some of the provisions of the proposed standards because of information obtained during the comment period and at public hearings (May 31, 1983, in Washington, and June 15-16, 1983, in Denver).

EPA received a wide range of comments on the proposed standards and the supporting documents. Several hundred letters were received and 34 individuals testified and/or submitted comments at the public hearings. Comments were received from a broad spectrum of participants, including private citizens, public interest groups, members of the scientific community, representatives of industry, and State and Federal agencies. EPA has carefully reviewed and considered these comments in preparing the FEIS, the RIA, and in developing these final standards. EPA's responses to major comments are discussed in this "preamble" and comments are discussed in detail in the FEIS. Section III of this preamble summarizes the major considerations upon which these standards are based,

and in Section IV we discuss the major issues raised in public comments, our responses to them, and the specific changes in the standards that resulted from our consideration of public comments.

These standards are divided into two parts. The first part applies to management of tailings during the active life of the pile, and during the subsequent "closure period," i.e., after cessation of operations but prior to completion of final disposal, including the period when the tailings are drying out. These are standards that govern milling operations.

The second part specifies the conditions to be achieved by final disposal. Those standards guide the activities carried out during the closure period to assure adequate final disposal. They are standards that govern the design of disposal systems.

The major provisions of the final rule are summarized in the following list, with changes from the proposed rule noted. The final rule:

(1) Applies to management and disposal of byproduct materials at sites where ore is processed primarily to recover its uranium or thorium content.

(2) Applies to the regulatory activities of NRC and the States that license uranium or thorium mills.

(3) Requires that ground water be protected from uranium tailings to background or drinking water levels to preserve its future uses by incorporating the Solid Waste Disposal Act (SWDA) rules.

(4) Requires that disposal of uranium tailings piles be designed so that, after disposal, radon emissions will be limited to 20 picocuries per square meter per second.

(5) Requires that the disposal of uranium tailings be designed to maintain its integrity, in most cases, for at least 1000 years.

(6) Requires liners be used for ground water protection.

(7) Permits the regulatory agency to issue alternate ground water standards when the normally required levels will be satisfied no further from the edge of tailings than the site boundary, or within 500 meters of the tailings, whichever is less (instead of requiring EPA concurrence, as proposed).

(8) Requires corrective action to restore groundwater to its background quality to be in place within 18 months of a determination of noncompliance (instead of the proposed 12 months).

(9) Requires equivalent levels of protection for wet sites (where precipitation exceeds evapotranspiration) as for dry sites (by deleting the exception permitting a nonpermeable cap at wet sites).

(10) Requires the same level of protection at all sites regardless of current local populations.

(11) Establishes equivalent requirements for thorium by-product materials.

III. Summary of Background Information

A. The Uranium Industry

The major deposits of high-grade uranium ores in the United States are located in the Colorado Plateau, the Wyoming Basins, and the Gulf Coast Plain of Texas. Most ore is mined by either underground or open-pit methods. At the mill the ore is first crushed, blended, and ground to the proper size for the leaching process which extracts uranium. Several leaching processes are used, including acid, alkaline and a combination of the two. After uranium is leached from the ore it is concentrated from the leach liquor through ion exchange or solvent extraction. The concentrated uranium is then stripped or extracted from the concentrating medium, precipitated, dried, and packaged. The depleted ore, in the form of tailings, is pumped to a tailings pile as a slurry mixed with water.

Since the uranium content of ore averages only about 0.15 percent, essentially all the bulk of ore mined and

processed is contained in the tailings. These wastes contain significant quantities of radioactive uranium decay products, including thorium-230, radium-226, and decay products of radon-222. Tailings can also contain significant quantities of other hazardous substances, depending upon the source of the ore and the reagents used in the milling process. Most of the tailings are a sand-like material and, because such materials are attractive for use in construction and soil conditioning, have been improperly used in the past, thereby contributing to spreading the radioactive materials offsite. Tailings materials are also subject to wind and water erosion, which may spread radioactive materials offsite.

As of January 1983, there were 27 licensed uranium mills, of which only 14 were operating. By early 1983, the amount of stored tailings had reached about 175 million metric tons (MT). The size of individual tailings piles ranges from about 2 million MT to about 30 million MT.

The future demand for uranium is projected to be almost exclusively for electrical power generation. Based on recent DOE projections, it is estimated that at least an additional 175 million MT of tailings will be generated by the year 2000 in the United States. This projection is for the conventional milling of uranium described above. A small quantity of uranium is also recovered as a secondary product in the extraction of other minerals, such as phosphate and copper, and also by solution (*in situ*) mining methods. Foreign sources of uranium may also influence demand projections for the domestic uranium industry, especially since some foreign deposits are richer in uranium, which permits lower pricing.

The United States Government purchased large quantities of uranium, primarily for use in defense programs, from 1943 to 1970. Many of the producers of this uranium continued operating after 1970 to supply the commercial demand for uranium. In most cases the tailings from Government and commercial purchases were mixed and stored in the same pile. These mixed tailings are now referred

to as "commingled" tailings. There are about 51 million MT of defense-related tailings commingled with approximately 74 million MT of other tailings at 13 of the sites which are now licensed for milling uranium ore.

B. Hazards Associated with Uranium Byproduct Materials

The most important of the hazardous constituents of uranium mill tailings is radium, which is radioactive. We estimate that currently existing tailings at the licensed sites contain a total of about 90,000 curies[1] of radium. Radium, in addition to being hazardous itself, produces radon, a radioactive gas whose decay products can cause lung cancer. Because of the long life of thorium-230 (about 75,000 years half-life), the amount of radium in tailings, and therefore, the rate at which radon is produced, will decay to about 10 percent of the current amount in several hundred thousand years. Other potentially hazardous constituents of tailings include arsenic, molybdenum, selenium, uranium, and, usually in lesser amounts, a variety of other toxic substances. The concentrations of all of these materials vary from pile to pile.

The radioactivity and toxic materials in tailings may cause cancer and other diseases, as well as genetic damage and teratogenic effects. More specifically, tailings are hazardous to man primarily because: (1) Radioactive decay products of radon may be inhaled and increase the risk of lung cancer; (2) individuals may be exposed to gamma radiation from the radioactivity in tailings; and (3) radioactive and toxic materials from tailings may be ingested with food or water. Our analysis shows the first of these hazards to be by far the most important.

As noted above, the radiation hazard from tailings lasts for many hundreds of thousands of years, and some nonradioactive toxic chemicals persist indefinitely. The hazard

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[1] A curie is the amount of radioactive material that produces 37 billion nuclear transformations (e.g., disintegrations of radium into radon) per second.

from uranium tailings therefore must be viewed in two ways. Tailings pose a present hazard to human health. Beyond this immediate but generally limited health threat, the tailings are vulnerable to human misuse and to dispersal by natural forces for an essentially indefinite period. In the long run the future risks to health of indefinitely-extended contamination from misused and dispersed tailings due to inadequate control overshadows the short-term danger to public health. The congressional report accompanying UMTRCA recognized the existence of long-term risks, and expressed the view that the methods used for disposal should not be effective for only a short period of time. It stated: "The committee believes that uranium mill tailings should be treated * * * in accordance with the substantial hazard they will present until long after existing institutions can be expected to last in their present forms * * *" and, in commenting on the Federally-funded program to clean up and dispose of tailings at the inactive sites, it stated "The committee does not want to visit this problem again with additional aid. The remedial action must be done right the first time." (H.R. Rep. No. 1480, 95th Cong., 2nd Sess., Pt. I, p. 17, and Pt. II, p. 40 (1978).)

For the purpose of establishing standards for the protection of the general public from radiation, we assume a linear, nonthreshold dose-effect relationship as a reasonable basis for estimating risks to health. This means we assume that any radiation dose poses some risk and that the risk of low doses is directly proportional to the risk that has been demonstrated at higher doses. We recognize that the data available preclude neither a threshold for some types of damage below which there are no harmful effects, nor the possibility that low doses of gamma radiation may be less harmful to people than the linear model implies. However, the major radiation hazard from tailings arises not from gamma radiation, but rather is due to alpha radiation from inhaled radon decay products. As pointed out by the National Academy of Sciences' (NAS) Advisory Committee on the Biological Effects of Ionizing Radiation (the BEIR Committee) in its 1980 report, for

"* * * radiation, such as from internally deposited alpha-emitting radionuclides, the application of the linear hypothesis is less likely to lead to overestimates of risk, and may, in fact, lead to underestimates."

Our quantitative estimates of the risk due to inhalation of radon decay products are based on our review of epidemiological studies, conducted in the United States and in other countries, of underground miners of uranium and other metals who have been exposed to radon decay products. We have also considered reports by scientific groups, such as *Health Effects of Alpha Emitting Particles in the Respiratory Tract (1976)* and *The Effects on Populations of Exposure to Low Levels of Ionizing Radiation (1980)* by the NAS; the report of the United Nations Scientific Committee on the Effects of Atomic Radiation (UNSCEAR) entitled *Sources and Effects of Ionizing Radiation (1977);* Report No. 32, *Limits for Inhalation of Radon Daughters by Workers (1981)* of the International Commission on Radiological Protection (ICRP); and *Risk Estimates for the Health Effects of Alpha Radiation,* by D.C. Thomas and K.G. McNeill (1982), a detailed review prepared for the Atomic Energy Control Board of Canada (AECB). Details of our risk estimates are provided in a previous EPA report, *Indoor Radiation Exposure Due to Radium-226 in Florida Phosphate Lands* (EPA 520/4-78-013), and in the FEIS.

Although the studies of underground miners show that there is a significant risk of lung cancer from exposure to radon decay products, there is uncertainty in its magnitude. Our estimates of the risk due to inhalation of radon decay products exceed those of the ICRP and UNSCEAR by a factor of at least two. However, neither group considered continuous exposure for the duration of a person's lifetime nor documented that they properly projected the risk observed to date in groups of underground miners over the balance of their expected lifetimes. These factors were explicitly considered by the 1980 NAS BEIR Committee. Although the NAS Methodology differs from that employed by EPA, their numerical estimates of risk due

to lifetime exposure are essentially identical to those of EPA. The most recent and complete assessment of the miner data, that performed for the AECB, yields a result within 20 percent of the EPA value. Numerical estimates of risk by various other observers differ by up to a factor of eight. We also considered the views of these other observers and discuss their results in the FEIS.

The uncertainties in risk estimates for exposure of miners to radon decay products arise from several sources. Exposures of miners were estimated from the time spent in each location in a mine and the measured radon decay product levels at those locations. However, radon decay product measurements were infrequent and often nonexistent for exposures of miners prior to the 1960's. The uncertainty increases when data for miners are used to estimate risk to members of the general public, because there are differences in age, physiology, exposure conditions, and other factors between the two populations.

We must also make numerous assumptions to estimate the radiation dose to individuals and population groups due to uranium mill tailings, and these introduce additional uncertainties. For example, we make risk estimates for individuals who are assumed to reside at the same location for their life spans, and we further assume that people will continue to have the same life expectancy as the U.S. population did in 1970. Nevertheless, we believe the information available supports estimates of risk which are sufficiently reliable to provide an adequate basis for these proposed standards.

It is not possible to reduce the risk to zero for people exposed to radiation or, for that matter, to many other carcinogens. To decide on a reasonable level of incremental residual risk, we evaluated the practicality and benefits of different levels of control. We also considered technical difficulties associated with implementing different levels of control.

Uranium mill tailings can affect man through four principal environmental pathways:

• *Diffusion of radon-222, the decay product of radium-226 tailings into indoor air.* Breathing radon-222, an inert gas, and its short half-life decay products, which attach to tiny dust particles, exposes the lungs to alpha radiation (principally from polonium-218 and polonium-214). The exposures involved may be large for persons who have tailings in or around their houses, or who live very close to tailings. Additional, but smaller, exposures to alpha radiation may result from long-lived radon-222 decay products (principally lead-210 and polonium-210). Exposure due to radon from tailings in or around buildings is best estimated from direct measurements of its decay products in indoor air.

• *Dispersal of radon and of small particles of tailings material in air.* Radon emitted from tailings is widely dispersed in air, and exposes both nearby residents and those at greater distances. These doses are predominantly to the lungs. Wind erosion of unstabilized tailings creates local airborne tailings material. The predominant dose from airborne tailings is to the bones from eating foods contaminated by thorium-230, radium-226, and lead-210, and is small. Exposure due to airborne transport of radon and particulates from tailings usually can be directly measured only near the pile or impoundment, but may be reliably estimated for larger distances using meteorological transport models.

• *Direct exposure to gamma radiation.* Many of the radioactive decay products in tailings produce gamma radiation. The most important are lead-214, bismuth-214, and thallium-210. Hazards from gamma radiation are limited to persons in the immediate vicinity of tailings piles or removed tailings. Exposure due to gamma radiation from tailings is readily estimated from direct measurements.

• *Waterborne transport of radioactive and toxic material.* Dispersal of unstabilized tailings by wind or water, or leaching, can carry radioactive and other toxic materials to surface or ground water. Current levels of contamination appear to be low at most sites. However, contam-

ination of surface and ground water and consequent intake by animals has been identified at three locations. Potential exposure due to this possibility of ground and surface water contamination is highly site-specific and can generally only be determined by a careful survey program.

Our assessments of risks from tailings deal primarily with risks to man. This is because risks to other elements of the biosphere are judged to be mush less significant, and would therefore be controlled to acceptable levels by measures adequate to protect man. In addition, the following discussion focuses largely on *current* levels of risk to man from tailings through air and water pathways. However, these current risks could be expanded by future misuse of tailings by man and by uncontrolled future effects of natural forces. Our disposal standards reflect consideration of both current and potential future risks from tailings.

1. Air Pathways

We estimated the hazards posed by emissions to air from tailings piles or impoundments and from tailings used in and around houses. For the first case we used standard meteorological transport models and considered exposure of people in the immediate neighborhood of the existing tailings sites, the population in local regions, and the remainder of the national population. For the second, we drew largely upon experience from houses contaminated by tailings in Grand Junction, Colorado. Four sources of exposure were considered: inhaled short-lived radon decay products, gamma radiation, long-lived radon decay products, and airborne tailings particulates.

From this analysis we conclude:

(a) Lung cancer caused by the short-lived decay products of radon is the dominant radiation hazard from tailings. Estimated effects of gamma radiation, of long-lived radon decay products, and of airborne tailings particulates are relatively less significant, although high gamma radiation doses may sometimes occur.

(b) Individuals who have tailings in or around their houses often have large exposures to indoor radon and hence high risks of lung cancer. For example, in 50 percent of a sample of 190 houses with tailings in Grand Junction, Colorado, we estimate that the excess lifetime risk to occupants due to exposure to short-lived radon decay products prior to remediation may have been greater than 4 chances in 100.

(c) Individuals living near an uncontrolled tailings pile or impoundment are also subject to high risks fom short-lived radon decay products of radon emitted directly from tailings. For example, we estimate that people living continuously next to some tailings sites can have incremental lifetime lung cancer risks as high as 2 chances in 100.

(d) Based on models for the cumulative risk to all exposed populations, we estimate that, without control, the radon released directly from all tailings currently in existence at presently (1983) licensed sites would cause about 500 lung cancer deaths per century. This figure does not account for any deaths from misuse or windblown tailings because their number is more difficult to predict, even though risk to individuals from such tailings may be somewhat greater than from direct radon emissions. By the year 2000, we estimate that, without control, the amount of tailings existing then would cause approximately 600 lung cancer deaths per century. Approximately one-half of these deaths are projected to occur less than 50 miles from the piles. This increase is small, due primarily to the large amount of unused capacity at present sites, so that most new tailings could be placed on top of existing tailings. This analysis assumes that this will be the actual case, although it is possible that ground water contamination problems would be severe enough to require some piles to be closed. If this is the case, this estimate would be increased.

There is substantial uncertainty in these estimates because of uncertainties in the rate of release of radon from tailings sites, the exposure people will receive from its

decay products, and from incomplete knowledge of the effects on people of these exposures. The values presented here represent best estimates based on current knowledge. In addition, these estimates are based upon current sizes and geographical distributions of populations and estimated production of tailings to the year 2000. As populations continue to increase in the future, and as production continues beyond the year 2000, the estimated impact will be larger.

Many commenters addressed the need to prevent misuse. Most concluded that misuse was the most hazardous aspect of tailings and should receive foremost attention. Although most concluded that misuse should be discouraged through means of passive controls, some concluded that misuse could be adequately controlled by institutional means. We conclude that a primary objective of standards for control of hazards from tailings through air pathways should be isolation and stabilization to prevent their misuse by man and dispersal by natural forces, such as wind, rain, and flood waters. A second objective is to minimize radon emissions from tailings sites. A third objective is the elimination of significant exposure to gamma radiation from tailings.

2. Water Pathways

Water contamination does not now appear to be a significant source of radiation exposure at most sites. However, in addition to radionuclides, nonradioactive toxic substances, such as arsenic, molybdenum, and selenium, can be leached from tailings and contaminate water. Such contamination could affect crops, animals, and people. Process water is used to carry tailings to the piles or impoundments as a slurry. Rainwater also may collect on the tailings. The greatest threat of contamination appears to be from process water discharged with the tailings from the mill, although, in principle, it could be from the gradual effects of rainwater over the indefinite future. Most of this water eventually evaporates or seeps away. Elevated concentrations of toxic or radioactive substances in ground

water have been observed at many active sites (seven are identified in the FEIS), and in some standing surface water ponds (but only rarely in surface running water). Any future contamination of water after disposal would arise from the effects of rain or through flooding, from penetration of tailings from below by ground water, or from leaching of tailings transported offsite.

A theoretical analysis performed for the NRC of a large model tailings impoundment with no seepage control showed that contamination of ground water by selenium, sulfate, manganese, and iron might exceed current drinking water standards over an area 2 kilometers wide and 8 to 30 kilometers long. More than 95 percent of this projected contamination was attributed to initial seepage of process water discharged with the tailings during mill operations.

We recognize that the NRC generic model is only one of several that could be applied to transport of contaminants in groundwater. Other models could predict greater or less risks of ground water contamination. An example of greater risk is a plume of contamination that, under certain circumstances, could still move cohesively towards a water supply after the flow of liquid through the tailings has stopped following closure of a pile.

In general, the movement of contaminants through a pile and subsoil to ground water depends on a combination of complex chemical and physical properties, as well as on local precipitation and evapotranspiration rates. Chemical and physical processes can effectively remove or retard the flow of many toxic substances passing through subsoil. However, some contaminants, such as arsenic, molybdenum, and selenium, can occur in forms that are not removed. Typically, ground water can move as slowly as a few feet per year, and only in coarse or cracked materials does the speed exceed one mile per year. For these reasons, contaminants from tailings may not affect the quality of nearby water supply wells for decades or longer after they are released. However, once contaminated, the quality

of water supplies cannot usually be easily restored simply by eliminating the source (although, in some cases, removing or isolating the tailings may contribute to improving water quality).

Based on results from the NRC generic model for mill tailings, it is likely that the observed cases of ground water contamination result from seepage of the liquid waste discharges from the mill, and can be controlled by preventing this seepage until the tailings dry out by natural evaporation. Additional future contamination of ground water after these liquid wastes are dried up should be much smaller, and in most cases would be expected to be eliminated by measures required to control misuse of disposed tailings by man and dispersal by wind, rain, and flood waters. These measures should also effectively eliminate the threat of contamination of surface water by runoff or from leaching of tailings transported offsite, and provide a degree of protection of surface and ground water from contamination by flooding. However, at some sites, especially in areas of high rainfall or where ground water tables intersect the tailings, special consideration of potential future contamination of ground water may be needed in designing disposal systems. For example, some commenters suggested incorporation of the SWDA rules for impoundment caps for wet sites. Others pointed out that for new piles careful site selection would provide protection of ground water.

We conclude that the primary objective of standards for control of hazards from tailings through water pathways is to prevent loss of process water through seepage, prior to closure. A secondary objective is to avoid surface runoff and infiltration both before and after disposal.

C. Control of Hazards from Tailings

We consider methods for control so as to assess the achievability, economic impact, and reliability of controls to meet alternative standards. As noted above, the objectives of tailings disposal (and of tailings management prior to disposal) are to prevent misuse by man, to reduce radon

emissions and gamma radiation exposure, and to avoid the contamination of land and water by preventing erosion of tailings by natural processes and seepage of waste process water. The longevity of control is particularly important. This can be affected by the degree to which control measures discourage disruption by man; and by the resistance of control measures to such natural phenomena as earthquakes, floods, and windstorms, and to chemical and mechanical processes in the piles or impoundments. ("Piles" commonly means tailings simply piled up on the ground, and "impoundments" means piles constrained by dikes made of other materials. We will use the term "piles" to mean both henceforth.) Prediction of the long-term integrity of control methods becomes less certain as the period of concern increases. Beyond several thousand years, longer-term geomorphological processes and climatic change become the dominant factors. Methods are available for projecting performance for periods up to about 1000 years. A recent report prepared for the NRC ("Design Considerations for Long-Term Stabilization of Uranium Mill Tailings Impoundments," Colorado State University, 1983) provides an up-to-date detailed review of these matters.

Methods to prevent misuse by man and disruption by natural phenomena may be divided into those whose continued integrity depends upon man and his institutions ("active" controls) and those that do not ("passive" controls). Examples of active controls are fences, warning signs, restrictions on land use, inspection and repair of semi-permanent tailings covers, temporary dikes, and drainage courses. Examples of passive controls are thick earthen covers, rock covers, massive earth and rock dikes, burial below grade, and moving tailings piles out of locations highly subject to erosion, such as unstable river banks.

Erosion of tailings by wind, rain, and flooding can be inhibited by contouring the pile and its cover, by stabilizing the surface (with rock, for example) to make it resistant to erosion, and by constructing dikes to divert rapidly

moving flood waters. Erosion can be inhibited even more reliably by burying tailings in a shallow pit and/or by locating them away from particularly flood-prone or otherwise geologically unstable sites. Thus, especially in the case of new tailings piles, shallow burial and sites with favorable long-term characteristics should be given preferred consideration.

Methods to inhibit the release of radon range from applying a simple barrier (such as an earthen cover) to such ambitious treatments as embedding tailings in cement or processing them to remove radium, the precursor of radon. Covering tailings with a permeable (porous) barrier, such as compacted earth, delays radon diffusion so that most of it decays in and is therefore effectively retained by the cover. In addition to simple earthen covers, other less permeable materials such as asphalt, clay, or soil cement (usually in combination with earthen covers) could be used. The more permeable the covering material, the thicker it must be to achieve a given reduction in radon release. However, maintaining the integrity of control of radon by thin, very impermeable covers, such as plastic sheets, is unlikely, even over a period as short as several decades, given the chemical and physical stresses present at piles.

The most likely constituents of cover for disposal of tailings are locally available earthen materials. The effectiveness of an earthen cover as a barrier to radon depends most strongly on its moisture content. Typical clay soils in the uranium milling regions of the West exhibit ambient moisture contents of 9 percent to 12 percent. For nonclay soils ambient moisture contents range from 6 percent to 10 percent. The exact value depends upon the material involved, and on local climatic conditions. The following table provides an example of the changes in cover thicknesses that might be required to reduce radon emission to 20 pCi/m^{2}s for the above ranges of soil moisture. Four examples of tailings are shown that cover the probable extreme values of radon emission from bare tailings (100

ESTIMATED COVER THICKNESS* (IN METERS) TO ACHIEVE 20 PCI/M²S**

Radon emission from tailings (pCi/m²s)	Percent moisture content of cover			
	6	8	10	12
100	1.7	1.3	1.0	0.7
300	2.8	2.2	1.5	1.1
500	3.4	2.6	2.0	1.5
1000	4.1	3.2	2.4	1.8

* These values were calculated from equation (9) in Appendix P of the Final Generic Environmental Impact Statement on Uranium Milling, U.S. Nuclear Regulatory Commission, NUREG-0706, September 1980. They do not include allowance for uncertainties in tailings moisture content or diffusion properties of the cover.

** A picocurie (pCi) is a trillionth of a curie. One picocurie of material produces just over two transformations per minute. A pCi/m 2 s is a unit for the release rate of radioactivity from a surface (m = meter, s = second).

to 1000 pCi/m²s); the most common value for old tailings is approximately 500 pCi/m²s, and for new tailings is approximately 300 pCi/m²s.

These values are for homogeneous covers, and assume the tailings have the same moisture content as the cover. In practice, somewhat thicker covers would be required to provide long-term assurance of satisfying any particular level of control. Some of the factors that must be considered for predicting long-term performance are moisture content of the tailings and cover at equilibrium, and the measured diffusion characteristics of cover materials. The DOE and NRC have conducted studies which provide a basis, at least within a limited range of control and predictability, for addressing these factors in the design of tailings covers based on locally available materials and climate.

Methods that control radon emissions will also prevent transport of particulates from the tailings pile to air or to surface water. Similarly, permeable covers sufficiently thick for effective radon control will also absorb gamma radiation effectively (although thin impermeable covers will not).

Two methods may be considered for protecting ground water at new tailings piles. The first is the placement of

a physical barrier, called a liner, between the tailings and the aquifer zone, to prevent water containing hazardous constituents from entering the aquifer. Either clay or plastic liners can be installed at about the same cost. Both have shortcomings. Plastic liners are impermeable, but may be subject to rupture through poor installation or uneven loading. Clay liners are permeable to some constituents, and may require use of additional measures, such as partial neutralization of the tailings, especially at acid leach mills, to satisfactorily protect ground water, but are expected to retain their effectiveness for long periods of time. The second method is treatment of process water to modify its acidity or alkalinity, if such treatment were shown to prevent contamination. At a neutral level many hazardous constituents of tailings liquids become insoluble and thus not available to contaminate ground water. However, not all hazardous constituents are so affected, and the action of rainwater, certain weathering processes, and mineralization of the soil or rock matrix can upset this neutralization over time, thereby releasing contaminants. There is little difference in costs for these two methods. Liners (either clay or synthetic) are currently required by NRC as a matter of good engineering practice for most new tailings impoundments.

EPA does not believe it is environmentally desirable to require all new wastes at existing sites to be placed on new piles, because new piles would increase radon emissions, at least until the pre-existing pile is covered, and would permanently contaminate more land. Satisfying ground water standards at existing tailings sites that do not have liners, however, will require widely varying actions from site to site. Neutralization of existing tailings is not a generally feasible option since it would require excavation of most, if not all of the tailings to assure mixing, and may not immobilize all hazardous constituents. Ground water contamination is known to have occurred at seven sites, and may be occurring at many others. It may not be possible to cleanup the ground water at some sites. In the worst cases a new, lined tailings pile may be re-

quired to prevent contamination from new tailings. In other cases, existing tailings piles may release essentially no contaminants to ground water because the type of soil they rest on acts as an effective liner. We have discussed the range of possible costs for cleanup of ground water in the FEIS and RIA. In practice, we expect most tailings piles will fall somewhere between these two extremes. Less expensive corrective action than a new liner may be sufficient to satisfy ground water standards for hazardous constituents at many sites. For example, an active water management program may be employed to reduce the quantity of water in the tailings and thus reduce the driving force for ground water contamination, or back pumping of water around the piles may prevent losses to the surrounding ground environment. Actions such as these are already being taken at certain sites (Cotter Mill, Canon City, CO, and Homestake Mill, Grants, NM, for example).

Control of possible long-term low-level contamination of ground water may sometimes be difficult. In cases where intrusion of contamination into ground or surface water is a potentially significant problem, liners and caps may provide a good degree of protection for at least many decades. However, more permanent protection may, in such cases, require choice of (for new tailings) or removal to (for existing tailings) a site with more favorable hydrological, geochemical, or meteorological characteristics.

Very effective long-term inhibition of misuse by man, as well as of releases to air and surface water, could be achieved by burying tailings in deep mined cavities. In this case, however, direct contact with ground water would be difficult to avoid. The potential hazards of tailings could also be reduced by chemically processing them to remove contaminants. Such processes have limited efficiencies, however, so the residual tailings would still require some control. Furthermore, the extracted substances (e.g., radium and thorium) would be concentrated, and would themselves require careful control.

We analyzed the practicality of a number of possible control methods. These are described in the FEIS and the

RIA. The total cost of disposal by surface or shallow burial is affected most strongly by the type of material used to stabilizer the surface of the trailings against erosion and to inhibit misuse by man, and by the water protection features required. Total costs are less sensitive to the amount of cover required to inhibit radon release. In general, costs of covers using man-made materials (e.g., asphalt) are somewhat higher than costs for earthen covers, and the reliability is lower. Active control measures are usually less costly in the short term than are passive measures, but are considered much less reliable in the long term. Deep burial of tailings piles or use of chemical processing to extract radium are much more costly than for surface or shallow burial (below grade) disposal using covers, and the practicality is not demonstrated.

D. Environmental Standards and Guidance Now Applicable to Uranium Tailings

EPA recognizes that it is establishing standards in an area that is already the subject of governmental regulation and has taken into account, where relevant, the existing schemes and levels of protection in developing these standards.

EPA promulgated 40 CFR Part 190, "Environmental Radiation Protection Standards for Uranium Fuel Cycle Operations," on January 13, 1977 (42 FR 2858). These standards specify the upper limits of radiation doses to members of the general public to which normal operations of the uranium fuel cycle must conform. They cover radiation doses due to all environmental releases of uranium by-product materials during the period a milling site is licensed, with the exception of emissions of radon gas and its decay products.

The Nuclear Regulatory Commission promulgated rules in 10 CFR Part 40 on October 3, 1980, which specify licensing requirements for uranium and thorium milling activities, including trailings and wastes generated from these activities (45 FR 65521). These rules specify technical, surety, ownership, and long-term care criteria for

the management and final disposition of by-product materials. Some of these rules are affected by these standards. For example, they specified a design objective of 2 pCi/m^2s and a longevity of greater than 1000 years for disposal of tailings. Due to congressional actions, these regulations have never been enforced by NRC, although some Agreement States have enforced comparable regulations. We note that the NRC regulations specified design objectives; that is, the values specified were to be achieved based on average performance; whereas these EPA rules specify standards, which designers must plan not to exceed, with a reasonable degree of assurance. The NRC has noted that any changes necessary will be made when these EPA standards are promulgated, and has already suspended those portions of its regulations which are affected by these standards (48 FR 35350; August 4, 1983).

Under the Agreement State program, States can issue licenses for uranium processing activities, including control and disposal of by-product materials. The NRC has enumerated in 10 CFR Part 150 the authorities reserved to it in its relations with Agreement States under the provisions of UMTRCA, and has specified conditions under which Agreement States may issue licenses under UMTRCA (45 FR 65521). NRC's conditions include the specification that State licenses must ensure compliance with EPA's standards. Some Agreement States can adopt more stringent rules than those adopted and enforced by the NRC, including requirements that are more stringent than EPA's standards.

EPA promulgated 40 CFR Part 260 et seq., "Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities," under Subtitle C of the Solid Waste Disposal Act, as amended on July 26, 1982 (47 FR 32274). Although radioactive materials controlled under the Atomic Energy Act of 1954, as amended, are not covered by the SWDA, UMTRCA requires that the standards proposed herein provide for protection of human health and the environment from nonradioactive hazards in a manner consistent with applicable standards promul-

gated under Subtitle C of the SWDA. The Act also requires the NRC to ensure conformance to "* * * general requirements established by the Commission, with the concurrence of the Administrator, which are, to the maximum extent practicable, at least comparable to requirements applicable to the possession, transfer, and disposal of similar hazardous material under [Subtitle C of SWDA]."

EPA promulgated 40 CFR Part 440, "Ore Mining and Dressing Point Source Category; Effluent Limitations Guidelines and New Source Performance Standards, Subpart C—Uranium, Radium and Vanadium Ores Subcategory," on December 3, 1983 (47 FR 54598). The purpose of 40 CFR Part 440 is to establish effluent limitations and standards under the Clean Water Act for existing and new sources in a number of ore mining and dressing subcategories. Out of 27 mills in the uranium, radium and vanadium ores subcategory existing at that time, only one was discharging directly to surface water. In view of this, the regulations did not establish best available technology (BAT) limitations for existing sources in this subcategory. The one uranium mill directly discharging effluents is currently regulated by a discharge permit in accordance with previously existing best practicable control technology (BPT) effluent limitations contained in 40 CFR Part 440. The new source performance standards (40 CFR 440.34(b)) were based upon the demonstration of no discharge to surface waters at the 26 other mills. These standards apply to locations where the annual evapotranspiration rate exceeds the annual precipitation rate (as is the case in most uranium milling areas), and require no discharge of process waste water to surface waters from mills using the acid leach, alkaline leach, or combined acid and alkaline leach process for the extraction of uranium. For locations where there is more precipitation than evapotranspiration process waste water can be discharged up to the difference between annual precipitation and evapotranspiration.

Solution extraction, or "*in situ*" mining, is a processing method in which uranium is recovered from ore without moving or disturbing the ore body. In this method holes

are drilled at selected points around an ore body and a solvent is pumped into some holes and the resulting solution out other holes. The solvent passes through the ore, dissolves the uranium, and carries it back to the surface. The uranium is then stripped from the solution and concentrated. The solvent, which is stored in holding ponds, can be treated and reused or discarded. Although this method produces no sandy tailings, it does produce sludges that contain many of the same radioactive and nonradioactive substances found in tailings piles. Consequently, the above-ground wastes from *in situ* mining are covered in these proposed standards. We note that because *in situ* mining and conventional milling currently are done in the same regions of the country, disposal of sludges on tailings piles may often be arranged.

Rules for protection of ground water from the underground operations of *in situ* mining are provided by the Underground Injection Control program promulgated under Sections 1421 and 1422 of the Safe Drinking Water Act. The associated regulations, 40 CFR Parts 144, 145, and 146, impose administrative and technical requirements on such operations, through either approved State programs or EPA-implemented programs. These regulations are not intended to apply to the underground ore bodies depleted by *in situ* uranium mining operations.

In addition to these rules established under UMTRCA, EPA is required to establish emission standards under the Clean Air Act (CAA) for hazardous air pollutants. Although there are no final standards for air emissions applicable to mill tailings piles, a proposed rule for radionuclides has been published in the Federal Register (48 FR 15076) on April 6, 1983. The relationship of the Clean Air Act of this rule is discussed in more detail later in this preamble.

Finally, radiation protection guidance to Federal agencies for the conduct of their radiation protection activities was issued by the President on May 13, 1960 and published on May 18, 1960 (25 FR 4402). Federal Radiation Pro-

tection Guidance governs the regulation of radioactive materials by the NRC and Agreement States, and includes the following guidance: "* * * every effort should be made to encourage the maintenance of radiation doses as far below [the Federal Radiation Protection Guides] as practicable * * *" and "There can be no single permissible or acceptable level of exposure without regard to the reason for permitting the exposure. It should be general practice to reduce exposure to radiation, and positive effort should be carried out to fulfill the sense of [this Guidance]. It is basic that exposure to radiation should result from a real determination of its necessity." This guidance is currently known as the "as low as reasonably achievable" (ALARA) principle. It is particularly suited to minimizing radiation exposure under conditions that vary greatly from site to site, or from time to time, and is an integral part of NRC and Agreement State licensing determinations.

The standards published here will supplement the above standards, guidance, and regulations in order to satisfy the purposes of UMTRCA to "* * * stabilize and control * * * tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public." UMTRCA does not provide specific criteria to be used in determining that these purposes have been satisfied. EPA's objective, when not preempted by other statutory requirements, has been to propose standards that: (1) Take account of health, safety, and environmental and economic costs and benefits in a way that assures adequate protection of the public health, safety, and the environment; (2) can be implemented using presently available techniques and measuring instruments; and (3) are reasonable in terms of overall costs and benefits.

The legislative record shows that Congress intended that EPA set general standards and not specify any particular method of control. "The EPA standards and criteria should not interject any detailed or site-specific requirements for management, technology or engineering methods * * *" (H.R. Rep. No. 1480, 95th Cong., 2nd Sess., Pt. I, P.17.) UMTRCA gives the NRC and the Agreement States the

responsibility to decide what methods will assure these standards are satisfied at specific sites. (However, EPA must concur with NRC regulations established to implement Section 82a(3) of UMTRCA.) Therefore, our analyses of risk, control methods, costs, and other pertinent factors emphasize the general characteristics of uranium mill tailings and the affected sites.

IV. Resolution of Major Issues Raised in Public Comments

A. The Basis for the Standards

1. Health Risk Models

Several commenters expressed the view that the models used by EPA overestimate health risks from breathing radon decay products. Others believe EPA underestimated the risk. For example, the American Mining Congress (AMC) stated that "EPA has systematically overestimated the factors which determine potential health effects from mill tailings. In the aggregate, these overestimates combine to yield an overestimate factor of about 60." These alleged factors are:

Area of model tailings piles	1.4
Randon flux per unit activity	1.8
Transport and dispersion models	5.0
Equilibrium for radon decay products	1.7
Risk of lung cancer	3.0
Population neer tailings piles	Unknown

The total radon emitted from tailings is approximately proportional to the surface area covered by tailings. EPA used the same area that NRC used in its FGEIS, 80 hectares, to estimate radon emissions. The AMC prefers 50 hectares, and points out that NRC (in NUREG-0757, Feb. 1981) later revised its estimate to 50 hectares. However, current projections of uranium production indicate that very few new mills or piles, if any, will start up between now and the late 1990's. Thus, unless a significant number of existing piles are unable to comply with the requirements of this rule regarding ground water protection, es-

sentially all radon emissions will be from existing piles, which have an average area of about 70 hectares, as shown in the FEIS. In addition, radon may be emitted from on-site areas contaminated by windblown tailings. We conclude the area of piles has been overestimated at most by a factor of 1.16.

The emission rate of radon per unit area of tailings is directly related to the activity of radium-226 in tailings. Several factors which are not well understood influence this emission rate. In the report cited above, the NRC concluded: "Considering the variation observed under differing conditions at a number of sites, the staff has elected to apply conservative specific flux values of 0.3 [pCi of radon-222 per square meter-second/pCi of radium-226 per gram of tailings] for wet tailings and 1.0 for dry tailings and to count moist tailings as dry in making the calculations." EPA agrees with this conclusion and believes no correction which assumes that some tailings are permanently wet is appropriate for this factor.

Regarding transport models, measurements are consistent with the transport and dispersion models we used. This is discussed in detail in the FEIS. The method used by EPA has been the basic work-horse of local dispersion estimation for years. In 1977, the participants of an expert group assessing atmospheric transport of radionuclides concluded that, for distances out to 10 km in reasonably flat terrain, and given good local wind observations: "Accuracy for the usual annual average concentration is about a factor of + 2." Furthermore, these dispersion estimates are based on an empirical approach that is inherently unbiased and that should therefore be as likely to overpredict as to underpredict.

It should be noted that we are not modeling background concentrations of radon. While it may be experimentally difficult to demonstrate the increment above background due to a tailings pile at distances greater than 1 km, there is no reason to believe that the basic physical principle of conservation of mass does not continue to be valid. Once

released to the atmosphere, radon, which is a chemically inert gas, disperses freely until it is removed by radioactive decay. We conclude that our dispersion estimates provide a reasonable basis for calculating atmospheric concentrations of radon.

There appears to be a misconception about the conditions to which EPA's assumption of a 0.7 equilibrium fraction for radon decay products applies. (The "equilibrium fraction" expresses the amount of radon decay products actually present relative to the maximum theoretically possible. This fraction is important, since the health risk is primarily due to radon decay products, not to radon itself.) Most of the data cited by commenters to support a lower equilibrium fraction are for situations in which the source of radon is diffusion into houses from underlying soil. In this situation the initial decay product equilibrium fraction is zero. For the airborne radon from tailings piles considered in EPA's estimates, the decay product equilibrium fraction in outdoor air approaches 1.0, beyond the vicinity of a pile. After taking into account periods of time an individual spends indoors and outdoors, periods of time a house is well-ventilated by outdoor air, and the fate of radon and decay products in outdoor air when it infiltrates a house, we conclude use of an average value of 0.7 for the effective equilibrium fraction for exposure of people to airborne radon from piles is appropriate for distances far from tailings piles. This value is therefore retained for calculations of total impact of radon releases from piles. Very close to tailings piles, however, the decay product equilibrium factor in outdoor air is low. We conclude, therefore, after taking the same indoor/outdoor factors into account, that an average effective decay product equilibrium fraction about one-half as large is probably more appropriate next to piles. This lower value should be applied to estimates of the maximum individual risk next to piles.

The EPA estimate of lung cancer risk from radon decay products is based on studies of uranium and other heavy metal miners, is consistent with the most recent recom-

mendations of the NAS BEIR Committee (1980), and is within 20 percent of the value recommended for use in a recent, exhaustive study conducted in Canada for their Atomic Energy Control Board (1982). We have noted our difficulties with the assumptions which underlie other estimates cited by commenters in our detailed responses to comments in the FEIS. We conclude the EPA value should be used in the absence of any convincing evidence that another value is more appropriate.

EPA used two regional populations for its risk estimates; the first population, identified as for a "remote" site, was hypothetical, and was taken from NRC's "Final Generic Environmental Impact Statement on Uranium Milling" (FGEIS). The second population, identified as for a "rural" site, is that for the Edgemont, S.D. site, and is based on 1970 census data. We assumed that a mix of six "rural" and 17 "remote" sites would properly represent the 23 sites modeled in the DEIS. We have just received the results of a 1983 population survey for all 52 mill tailings sites performed for us by Battelle Pacific Northwest Laboratories. This survey, which was limited to individuals within 5 km of the piles, shows that the total population at the 26 active sites was 2054 within 2 kilometers of all active tailings piles, and 14,737 within 5 kilometers.

We have re-evaluated the local and regional health risk based upon this re-survey of current populations within 5 km and 1970 census results for populations from 5 to 80 km of the 26 active sites. The re-evaluation show a small decrease in calculated local effects, and an increase of equal size in calculated regional effects. (Our estimates of risk to more distant populations, i.e., to the remainder of the United States, are unaffected.) These data indicate that our initial estimate of total health effects to populations is correct. (We note that we have assumed that there will be no increases of populations at these sites over the next 1000 years, a clearly nonconservative assumption.)

In summary, we do not believe the total health effects in the DEIS have been overestimated. The factor of about

1.16 due to a slightly different average pile area is likely to be negated by normal population increases (not accounted for in our estimates) within the first few decades of the lifetime of the hazard posed by these tailings. The estimate of maximum individual risk for a model pile is affected principally by our assumption for the equilibrium fraction for radon daughters, and should be reduced by about a factor of two. We believe this change is insufficient to warrant changing our basic conclusions regarding the risk from tailings.

2. Significance of Risk from Radon Emitted by Tailings Piles

Several commenters argued that EPA has not demonstrated that the risks associated with radon emissions from tailings are significant, and observed that much of the health impact attributed to tailings accrues to very large numbers of people at very low levels of individual risk. They suggested that the proper test of significance is to compare such risks with common hazards, such as the risk from the natural background radiation. For example, they would compare the 6 lung cancers per year that EPA estimates (see FEIS) could result from uncontrolled tailings piles after the year 2000 with: the 21,000 such cancers a commenter estimated as caused annually by background radiation; deaths from motor vehicle accidents (50,000 per year) and home accidents (25,000); tornadoes (130); etc. Based on such comparisons, these commenters concluded that the risks from radon emitted from tailings are not significant,and that EPA's standard should not limit such emissions.

EPA believes these comparisons are misdirected and do not address a central purpose of the legislation that requires this rulemaking, which is to "* * * make every reasonable effort to * * * prevent or minimize radon diffusion into the environment * * * from * * * tailings." EPA recognizes that radiation background and other common hazards cause far greater total annual harm than anyone would reasonably estimate might occur from un-

controlled radon emissions from tailings. However, these other risks are not the subject of this rulemaking. Comparisons of the type suggested may be useful for setting priorities for efforts to reduce the variety of hazards to public health (to the extent that they are avoidable), but they are not useful for deciding the appropriate level of control for a specific source of hazard. That decision must be based upon the specifics peculiar to the hazard under consideration. The existence of other hazards does not, absent Congressional direction, justify EPA's delaying these standards until all other controllable hazards are addressed, or justify EPA's ignoring Congress' will that standards be set.

The fact that the health impact of tailings is in large part attributable to small radiation doses delivered to large numbers of people over long periods of time was recognized when UMTRCA was enacted. The then Chairman of the NRC testified as follows: "The health effects of this radon production are tiny as applied to any one generation, but the sum of these exposures can be made large by counting far into the future, large enough in fact to be the dominant radiation exposure from the nuclear fuel cycle. Whether it is meaningful to attach significance to radiation exposures thousands of years in the future, or conversely, whether it is justifiable to ignore them, are questions without easy answers. The most satisfactory approach is to require every reasonable effort to dispose of tailings in a way that minimizes radon diffusion into the atmosphere." (H.R. Rep. No. 1480, 95th Cong., 2nd Sess., Pt. II, p. 25.) We have concluded that maximum individual lifetime risk (estimated as 2 in 100) and the long-term cumulative impact on populations (potentially many tens of thousands of deaths over the long term) due to radon emissions from tailings are clearly significant enough to justify controls. As discussed in the FEIS, RIA, and a later section of this Preamble, our analysis shows that tailings can, at a reasonable cost, be disposed of in a manner that provides, among other benefits, greatly reduced radon emissions.

3. Standards Based on Current Populations

During the review of the standards for the inactive sites by certain Federal agencies, questions were raised regarding the appropriateness of the control standards for general application to all 24 inactive sites. Some reviewers suggested that less restrictive standards might be appropriate for sites that are in currently sparsely-populated areas. Other reviewers suggested that we consider a radon standard that applies at and beyond the fenced boundary of such a site, i.e., a standard that relies in part on dispersion and institutional maintenance of control over access. EPA requested public comments on these issues for the inactive sites (48 FR 605, January 5, 1983). These issues are most simply stated as: (1) Should the degree of radon control after disposal depend in part on the size of the current local population, and (2) Should implementation of the disposal standards be permitted to depend primarily or in part on maintenance of institutional control of access (e.g., by fences)? We also specifically requested comments on these issues in the April 29, 1983 notice of proposed rulemaking for active mills.

Most commenters who addressed the first of these issues opposed different standards at remote sites (although most industry comments favored less restrictive standards for *all* sites). Many raised the "equity" consideration, i.e., the fairness of protecting a few people less just because of where they live. Others commented that many of these sites are locations where people are unlikely to live, or, conversely, that the sizes of populations in the future are not predictable and cited examples of recent changes. Finally, commenters who addressed the issue of whether EPA is authorized to set different standards based on "remoteness" denied that the Agency has such authority.

In 1983 EPA counted the number of people living close to all the active and inactive mill sites. Of the 52 sites surveyed, only 7 had no people living within 5 kilometers (3 miles). Another 6 sites had 10 or fewer people living within 5 kilometers. Collectively, however, the mill sites

have a normally distributed continuous range of local populations, and it is not possible to distinguish a special set of sites. The definition of a remote site is therefore difficult to achieve, unless it is done arbitrarily. In addition, demographers have concluded that it is not possible to determine that a population at a specific location will remain low in the future, if it is low now. Therefore, a choice of two different standards implies a need for institutional oversight of future population shifts and for having to upgrade the disposal at those sites that exceed some criterion of "remoteness." Presumably, the State or Federal custodian would be responsible, not the original owner.

The motivation for considering relaxed standards at "remote" sites is to reduce the cost of disposal. Our analysis shows that any potential cost saving from less restrictive standards at such sites is not commensurate with the loss of benefits. In a later section we report the costs for several relaxed radon standards. These results show, for the case of *no* radon emission limit (case C1) and with no provision for the added costs of institutional control through fencing, land-use control, and land acquisition (to avoid unacceptably high individual doses to nearby residents), and with no provision for increased costs to meet closure requirements under SWDA (discussed below), that 46 percent of the cost of disposal at the level required by these standards (case C3) would be potentially recoverable. We have examined the added costs required for institutional control and conclude that they may vary from about 10 to 50 percent of these potentially recoverable costs, depending mostly on the cost of land acquisition at specific sites. Costs for conformance to RCRA closure requirements for a cap under §264.228(a)(2)(iii)(E) range from about 50 to 140 percent of these potentially recoverable costs, depending upon whether or not the pile has an impermeable liner under it or not. (This SWDA requirement was excepted under the proposed standards, on the basis that it would interfere with the moisture required for radon control. This basis would no longer exist in the ab-

sence of a radon limit.) Any savings through deletion of radon control would be achieved by forgoing approximately one-half of the annual benefit (the entire impact on nonregional national populations), a considerable degree of protection against misuse, and a significant part of the anticipated total term of effective protection from all hazards, due to the greatly reduced thickness of the cover. We have concluded, therefore, independent of other considerations, that when costs for institutional control and compliance with SWDA closure are added and the net saving is applied to only those sites that might be defined as "remote", the potential total cost saved is not significant enough in comparison to the benefits foregone to justify separate standards.

Finally, with regard to the Agency's legal authorization to establish a separate level of protection at remote sites by issuing two sets of standards, UMTRCA clearly contemplates that these standards be adequate for the long term and that they achieve the benefits of radon control. Regarding those objectives, we are aware of no site that is uninhabited and can also reasonably be assumed will remain uninhabited, nor are we aware of any scientific basis for concluding that there is no impact on national populations due to radon emissions from remote sites. We conclude, therefore, that relaxed standards for "remote" sites are not feasible on demographic grounds, are not defensible on legal grounds, and are not attractive, in any case, on the basis of cost-effectively achieving the various public health and environmental goals of this rulemaking.

4. Passive vs. Institutional Controls

As noted above, EPA also requested comments on whether a radon limit applied at the boundary ("fenceline") of the Government-owned property around a tailings pile, i.e., a "dispersion" standard, would be an appropriate form of standard for the sites with low nearby populations. (Such consideration could also apply to some more populated sites.) Such a dispersion standard could be satisfied largely by institutional methods, i.e., by acquiring and maintaining control over land. The proposed disposal standard, by com-

parison, would require generally more costly physical methods (such as applying thick earthen covers) that directly control the tailings and their emissions with minimal reliance on institutional methods (i.e., it is a "control" standard). EPA also requested comments on the adequacy of such a radon "fenceline" standard to meet the objectives of the UMTRCA.

Comments on this issue ranged from strong support of primary reliance on passive stabilization for periods greater than 1,000 years to protection for only a few decades wih primary reliance on institutional controls. A majority of commenters recommended retaining primary reliance on passive control rather than on institutional control. Those that favored use of institutional control (principally of misuse and maximum individual exposure) argued for limiting public access through use of fences and administrative control of land use. Those opposed cited the lack of reliability of such control, especially through use of fences in remote areas of the western United States.

EPA considers that protection from the long-term hazards associated with radioactive waste should primarily rely on passive control methods. We note, in this regard, the intent of Congress as stated in the congressional report accompanying UMTRCA: "The committee believes that uranium mill tailings should be treated in accordance with the substantial hazard they will present until long after existing institutions can be expected to last in their present forms." In addition, as noted in the proceeding section, the costs of land acquisition to limit maximum individual exposures can easily negate a significant fraction of potential savings through use of thinner covers. However, institutional controls can play a useful secondary role in supplementing passive controls and in assuring during the early period of disposal, that passive controls are adequate to achieve their design objectives.

Section 202 of the UMTRCA requires the Federal Government or the States to acquire and retain control of these tailings disposal sites under licenses. The licensor is

authorized to require performance of any maintenance, monitoring, and emergency measures that are needed to protect public health and safety. We believe that these institutional provisions are essential to support any project whose objective is as long-term as are these disposal operations, and for which we have as little experience. This does not mean we believe that primary reliance should be placed on institutional controls; rather, that institutional oversight is an essential backup to passive control. For example, as long as the Federal Government or the States exercise their ownership rights and other authorities regarding these sites, they should not be inappropriately used by people. In this regard, even with the disposal actions required by these standards it would not be safe to build habitable structures on the disposal sites. Federal or State ownership of the sites is assumed to preclude such inappropriate uses.

5. Control of Radon Releases During Milling Operations

The proposed rule anticipated that the regulatory agency apply the "as low as reasonably achievable" (ALARA) principle of Federal Radiation Protection Guidance in establishing management procedures and regulations to control radon from operating mills. This approach was proposed because EPA concluded that a numerical standard to control radon was inappropriate for application during operations. This is because practical methods for reducing radon emissions during operations of existing mills and piles vary in effectiveness with time; it is very difficult to measure, quantitatively, their efficacy; and different methods are appropriate for different sites. The primary means for controlling radon emissions from existing tailing piles during operations are to keep the tailings as wet as possibile or to use phased disposal.

Some commenters indicated that the provisions of the proposed rule were inadequate to assure that the public would be protected. They argued that EPA has the responsibility under both UMTRCA and the Clean Air Act to provide suitable health protection to all members of the

public. They suggested that requiring certain work practices or tailings management practices would provide greater public health protection than the provisions of the proposed rule. For example, they note that "staged" or "phased" disposal of tailings and good water management practices could be effective and reasonable.

EPA will consider further the feasibility and practicality of providing greater assurance that radon releases will be minimized during milling operations than would the proposed rule. The Agency has not sufficiently analyzed work practice and tailings management techniques to determine whether they are suitable for this purpose and which alternatives are best. Therefore, the Agency will publish an Advance Notice of Proposed Rulemaking under the Clean Air Act for consideration of the control of radon emission from uranium tailings piles during the operational period of a uranium mill. The ANPR will enable the Agency to gather information on the feasibility, effectiveness, and cost of various alternatives that would control radon releases from operating mills. This will enable EPA to be better informed when judging whether standards are needed, and, if so, the most suitable requirements.

B. Disposal Standards

1. Design Requirements for Long-Term Protection

Comments on this issue were greatly divergent. Some commenters believed controls should be required to last for thousands of years while others thought a few decades would be adequate. Comments from experts in the fields of civil engineering and geomorphology were useful in resolving this issue.

Standard design practice for structures that, should they fail, could lead to loss of life or significant destruction of property is based on the likelihood that a sufficiently disruptive event (e.g., a flood or hurricane) might occur within a specified time. For example, a bridge may be designed to withstand all disruptive events that have more than 1 chance in 100 of occurring within, say, 50 years.

Commenters noted that rushing water caused by very high rainfall events might damage or destroy a tailings containment system that lies in its path (floods that merely cover or wet a pile are not as significant). Therefore, they suggested, the disposal method should be designed to withstand any such rainfall events that have more than a small likelihood of occurring during the period for which control is to be "reasonably assured." Expert commenters noted that floods of greater magnitude than a "1000-year flood," for example, as they are generally defined, have a high likelihood of occurring within 1000 years. Thus, in order to provide reasonable assurance that a pile will withstand all floods that have more than some small chance of occurring within 1000 years, the control system must be designed to withstand much rarer events, such as a "probable maximum flood." In practice, they suggested, adequately protecting piles for even a few hundred years requires designing control systems to withstand all events that are likely to occur within thousands of years. Furthermore, the maximum rainfall that might be expected to occur within thousands of years is very nearly the maximum possible rainfall. Therefore, in practice, the system would have to be designed for approximately the same (i.e., maximum) rainfall whether the control period is 200 years or 1000 years.

As discussed above, we believe protection for only a short period (a few decades) is inconsistent with the intent of Congress. Some commenters argued for periods longer than 1000 years. We believe that the specification of a design period of 1000 years will achieve the objectives of these commenters, while at the same time giving engineers who must carry out these standards a design criterion reasonable to assess. We note that commenters did not identify any specific design features that would flow from a greater than 1000-year criterion that would not already be required to satisfy a 1000-year requirement.

Based on these considerations we conclude that the time over which protection should be provided should be specified as proposed.

A closely related matter is the degree of assurance with which controls can be designed to meet the longevity requirement. Some failure modes can be well quantified (e.g., performance of dikes, etc.) and others may not be as well characterized (e.g., aging characteristics of rock used to stabilize slopes). We recognize that, in some cases, it may therefore be difficult to certify conformance in all respects to a 1000-year requirement for longevity of control. For this reason we have retained the flexibility of the proposed rule to certify for shorter periods (but in no case less than 200 years). We leave the matter of fully defining what constitutes "reasonable assurance" to the implementing governmental agencies, but expect that standard engineering (design) criteria will be used to limit the probability of failure over the required longevity period to a value consistent with other design situations where public health and safety are important concerns.

2. Radon Emission Limit

Quantitative estimates of health effects from tailings can reasonably be made for radon emissions and windblown particulates. Health effects from misuse of tailings and water contamination cannot be quantified because of the extremely high degree of uncertainty associated with the likelihood and extent to which misuse and contamination might occur and the consequent degree to which people will consequently be exposed to radiation and toxic substances. (For example, tailings used as fill in unoccupied areas would not result in direct human exposure. Using tailings as fill for residential buildings carries a high probability of very significantly elevating radiation exposure and risk. The degree to which people might be exposed to contaminants from tailings through waterborne pathways is subject to similarly high uncertainties.)

The likelihood of health effects from exposure to radon and its decay products is, considerably greater than from particulates, even when external radiation and food chain contributions are included in the estimates for particulates. Therefore, the only quantitative estimates of effects dis-

cussed are those for radon emissions. We believe, however, that effects from misuse or water contamination could be comparable to those from radon emissions if long-term protection is not afforded.

The primary concern of commenters who thought the proposed radon emission standard was too lax was the risk to nearby individuals. The estimated added lifetime risk of fatal lung cancer for someone living 600 meters from the center of a model pile is 1 in 1000 due to radon from a tailings pile emitting radon at the level of 20 pCi/m^2s, if the cover is designed to just achieve that emission level without employing additional control to provide reasonable assurance of achieving it for 1000 years.

Commenters who thought the proposed radon emission standard is too strict contended that the cost of compliance would be too high, in view of the small contribution radon from tailings makes to a population's total exposure to atmospheric radon. They also generally believed EPA had overestimated the health effects from radon. We have addressed this last concern in an earlier section of this notice.

Selecting a limit for radon emission from tailings involves four public health objectives, in addition to reducing health effects from radon released directly from the pile. These may all be achieved by using a thick earthen cover, which serves to inhibit misuse of tailings, to stabilize tailings against erosion and contamination of land and water, to minimize gamma exposure, and to avoid contamination of ground water from tailings. A radon emission limit of 20 pCi/m^2s or less would require use of a sufficiently thick earthen cover to achieve all of these objectives. A limit of 60 pCi/m^2s or greater could be satisfied in many cases by a cover too thin to effectively inhibit misuse. Such a cover would also permit higher individual risks (up to 3 in 10^3) and would leave 20 percent of the potential health impact on populations uncontrolled. Our analysis shows that a limit of 20 pCi/m^2s is also cost-effective for eliminating most (95%) health effects in regional and national populations from radon released directly from the pile.

Such a limit would also reduce maximum individual risks to residents near tailings piles to less than one in 1000. We concluded that levels higher than 20 pCi/m^{2}s are not justified, based on the cost-effectiveness of reduction of cancer deaths in populations, the high maximum individual risks involved at higher levels, and the likelihood that control to a level of 20 pCi/m^{2}s is reasonably achievable.

The risk to people who live permanently very close to tailings piles can still be relatively high, up to 1 in 1000 for lifetime residency, for a limit of 20 pCi/m^{2}s. However, the practicability of providing more radon control by requiring design for lower levels of emission falls rapidly below 20 pCi/m^{2}s. We note that no pile has ever been protected by such a cover; that is, covers with defined levels of control and longevity are undemonstrated technology. The design of covers to meet a specific radon emission limit at these low levels must be based on measurements of properties of local covering materials and prediction of local parameters, such as soil and tailings moisture, over the long term. Because of uncertainties in measuring and predicting these parameters, the uncertainty of performance of soil covers increases rapidly as the stringency of the control required increases. Thus, in the case of lower levels, the primary issue becomes whether conformance to a design standard for such levels is practicably achievable. There is some field information available regarding the practicality of reduction of radon emissions to levels approaching background. Tests conducted at a pile in Grand Junction, Colorado, showed that test plots of 3-meter thick covers made from four different earthen combinations reduced radon emissions to values ranging from 1.0 + 1.1 to 18.3 + 25.2 pCi/m^{2}s. The efficiencies of these covers ranged from 88.8 percent to 99.7 percent. These results apply to the first two years after emplacement, and do not reflect performance after long-term moisture equilibrium is achieved (some moisture contents were still considerably elevated over prevailing levels). We believe results like these can generally be expected, because

the radon control characteristics of earthen materials used for covers will vary from site to site. Three of the four covers studied satisfied 20 pCi/m²s with a reasonable degree of certainty over the term of the test. The other cover (18.3 + 25.2 pCi/m²s) was uncompacted and its poor performance can therefore be discounted. Exactly how much thicker these covers would need to be to reliably achieve a lower limit (e.g., 6 or 2 pCi/m²s) is not known. Experts commented during hearings on the standards that, although covers can be designed to meet such levels as 20 pCi/m²s, estimation models are not reliable at significantly lower emission levels.

We concluded that achieving conformance with a radon emission standard that is significantly below 20 pCi/m²s (6 or 2 pCi/m²s, for example) clearly would require designers to deal with unreasonably great uncertainty for this undemonstrated technology. That is particularly so because EPA is already requiring a margin of safety in calling for any control system to meet the designated emission level with reasonable assurance over 1000 years. Given the predictive uncertainties in designing to meet this standard, EPA judged that to force an accounting for a second set of predictive uncertainties by forcing the standard to very low nominal levels would be to exceed the limits of reasonably available technology.

The risk from radon emissions diminishes rapidly with distance from the tailings pile (declining by a factor of three for each doubling of the distance beyond a few hundred meters). There currently are only about 30 individuals living so near to active piles that they might be subject to nearly maximum annual post-disposal risks. We expect that the actual number of people who might experience near maximal lifetime risk will be smaller, since they would have to maintain lifetime residence in the land area immediately adjacent to a tailings piles. In sum, we believe that the probability of a substantial number of individuals actually incurring these maximum calculated risks is small.

We conclude that it is not reasonable to reduce the emission standard below 20 pCi/m²s because of: (1) The uncertainty associated with the feasibility of implementing a requirement for a significantly lower standard, (2) the small increase in total health benefits associated with such thicker covers, and (3) the limited circumstances in which the maximum risk to individuals might be sustained.

As noted above, the 20 pCi/m²s emission limit was selected to meet the stated objectives of reducing the likelihood of misuse, spreading due to erosion, and control of radon emissions after a thorough evaluation of the current existing information on the technical and economic aspects of alternative levels of control. EPA recognizes the limitations inherent in this information, since no pile has yet been disposed of. Better information may well become available within the next several years as DOE proceeds with the disposal program for inactive piles. Therefore, consistent with Section 275(b)(2) of UMTRCA, EPA intends to continue to monitor these efforts over the next several years and will propose revising these standards if subsequent technical and economic information shows modifications are warranted.

The standard requires that disposal be designed to provide "reasonable assurance" that radon emissions will not exceed 20 pCi/m²s (averaged over the disposal area) for 1000 years. Some commenters expressed the opinion that the meaning of this term was not clear. A key word in this requirement is "designed," since we do not intend compliance with a 1000-year requirement to be determined by monitoring. "Reasonable assurance" in the design of covers means the radon emission limit should be expected to be achieved, over the required term, with a degree of assurance commensurate with the "reasonable assurance" of longevity discussed in the preceding section. Thus, in designing the cover the uncertainties in attenuation characteristics of material used should be taken into account in a conservative manner. This will tend to increase the cover thickness required over that calculated from "best estimated" values, which would yield an approximately

equal probability of achieving above or below the design level. An example of uncertainty to be considered is that in the long-term equilibrium value of moisture to be expected in the cover material (i.e., over 1000 years), even though the cover material may be sprayed with water when it is laid down and compacted, and layers of coarse materials introduced to inhibit capillary action. Such spraying and layers increase the moisture (and therefore attenuation) of the cover in the near term, but it is the long-term equilibrium moisture content which governs the performance of the cover over most of its useful life. Other factors include uncertainty in measured diffusion characteristics of the particular earthen materials used (for given moisture content), and in the long-term equilibrium moisture content of the tailings themselves. In summary, we intend that the design requirement for "reasonable assurance" should lead to thick durable covers that have a substantial likelihood of maintaining radon emissions below the 20 pCi/m^2s limit for 1000 years.

A related matter is implementation of the specification that the standard for radon emission applies to the "average" value of the release rate. This averaging is to be carried out in two ways. First, it applies over the spatial extent of any disposal area. Thus, anticipated variations due to different concentrations of radium in different parts of the pile, or minor cracks or the effects of burrowing animals and plant roots are to be averaged over, since it is the net radon from the entire tailings pile that is of significance to health. Second, the averaging is specified to apply over a time period of at least one year. Thus, daily and seasonal variations in radon emission are to be averaged over, since these are also not of significance to public health. Finally, this averaging may extend over longer periods to accommodate normal fluctuations in soil moisture content due to short-term climatic variations. Thus, the lowest recorded values of soil moisture content should not be used; rather, the average values are appropriate. Such averages should not, however, extend to times as long as the normal human lifespan, since that could

result in a significant alteration in the level of protection of public health. Similarly, averaging performance over the entire period of longevity of the cover is not within the meaning of the standard.

3. Relationship to the Clean Air Act Emission Standard Requirements

The Clean Air Act also requires that EPA provide public health protection from air emissions from tailings piles. Further, EPA is publishing an ANPR to consider additional control of radon emissions during the operational phase of mills. This discussion relates to the disposal phase.

The Clean Air Act requires that the Administrator establish a standard at the level which in his judgment provides an ample margin of safety to protect the public health from hazardous air pollutants. The Agency published proposed rules for radionuclides as National Emission Standards for Hazardous Air Pollutants (NESHAPS) on April 6, 1983 (48 FR 15076). The proposed rule addressed all of the sources of emissions of radionuclides that EPA had identified. The proposed rule either provided standards for various source categories or proposed not to regulate them and provided reasons for that decision.

In the proposed NESHAPS for radionuclides EPA did not propose additional standards for uranium mill tailings, because the Agency believed the EPA standards to be established under UMTRCA would provide the same degree of protection as required by Section 112 of the Clean Air Act. The Agency explained that Congress did not describe the degree of protection that provides an ample margin of safety, nor did it describe what factors the Administrator should consider in making judgments on the appropriate standard. The Agency indicated that it did not believe that it was reasonable to establish standards for nonthreshold pollutants like radionuclides at levels that preclude any possible risk. EPA concluded that it should follow an approach that would allow it to consider various factors that influence society's health and well being. Therefore, EPA chose to consider the following factors in

deciding whether standards are needed and the appropriate level of such standards:

1. The radiation dose and risk for nearby individuals;

2. The cumulative radiation dose and health impacts in populations;

3. The potential for radiation emissions and risk to increase in the future;

4. The availability, practicality, and cost of control technology to reduce emissions, and

5. The effect of current standards under the Clean Air Act or other applicable authorities.

The first three factors are used to assess the likely impact of emissions on the health of individuals and large populations and to estimate the potential for significant emissions in the future. The fourth factor enables EPA to assess whether state-of-the-art control technologies are currently in use and whether there are any practical means of reducing emissions through control technology or other control strategies. The last factor allows EPA to assess whether regulations or standards that have been established to control other pollutants are also minimizing releases of radionuclides.

The dose and risk for the individuals nearest a site are often the primary considerations when evaluating the need to control emissions of radionuclides. Controlling maximum individual dose assures that people living nearest a source are not subjected to unreasonably high risk. Further, protecting individuals often provides an adequate level of protection to populations living further away from the source.

EPA believes that cumulative dose and health impacts in populations are also an important factor. The cumulative radiation dose and health impact are determined by adding together all of the individual doses and risks that everyone receives from an emission source. This factor can sometimes be more important than the maximum individual risk in deciding whether controls are needed, particularly if an

extremely large population may be exposed at low levels. The aggregate dose and population impact can be of such magnitude that it would be reasonable to require a reduction in the total impact even though, if the maximum individual dose were considered alone, one might conclude that no further controls are needed. For mill tailings, although population doses and health impacts were an important part of our consideration, doses to the most exposed individual were equally important.

In addition, EPA considers the potential for emissions and risk to increase in the future, even though the current projected maximum individual and population risks may be very low. In this case, we do not anticipate significant future increases in the size of this industry, although populations around these sites may increase, as the national population increases.

The availability and practicality of control technology are important in judging how much control of emissions to require. EPA believes that the standard should be established at a level that will, at least, require use of best available technology. Additional actions, such as forcing the use of undemonstrated technology, closure of a facility, or other extreme measures may be considered if significant emissions remain after best available technology is in place or if there are significant emissions and there is no applicable demonstrated control technology. EPA defines best available demonstrated technology as that which, in the judgment of the Administrator, is the most advanced level of controls adequately demonstrated, considering economic, energy, and environmental impacts. We concluded that requiring the use of undemonstrated technology was appropriate for mill tailings, since their emissions are significant and there is no applicable demonstrated control technology.

Finally, EPA believes it is reasonable to consider whether other EPA standards are achieving approximately the same goal as the Clean Air Act, i.e., protecting public health with an ample margin of safety. In cases where

other standards are providing comparable control, EPA believes it is appropriate not to propose redundant standards under the Clean Air Act. There would be no benefits because the public health would already be protected with an ample margin of safety, but there could be unnecessary costs associated with implementing an additional standard.

The Clean Air Act specifies that the Administrator promulgate emissions standards to protect the public health. The Administrator is also authorized to promulgate design, equipment, work practice, or operational standards, or a combination, if it is not feasible to prescribe or enforce emission standards. The Administrator can conclude that "it is not feasible" if a hazardous pollutant cannot be emitted through a conveyance or the use of the conveyance would be contrary to laws, or if measurement methodologies are not practicable due to technological or economic limitations. As noted above, we will consider the need for such standards for the operational phase of mills.

With respect to these disposal standards, EPA has concluded that design to provide reasonable assurance that the release of radon will not exceed 20 pCi/m^{2}s for a period of 1000 years is appropriate. The level of the standard was selected after considering potential impacts both on individuals and large population groups. We consider that the uncertainties involved in design to various levels and durations of control are important factors. Potential increases in the number of mill tailings piles due to future needs for uranium were also considered. In addition, the cost and socio-economic impact of the standard and other alternatives were considered. In light of all of these considerations, EPA judges it appropriate that the standard require a level of control not heretofore applied, but for which the design uncertainties that must be accommodated are within the range of practical feasibility.

It would be desirable to reduce potential maximum individual risk further. However, the uncertainties associated with attempting designs to achieve assurance of conformance to a significantly lower standard through use of

thicker covers are, we believe, unreasonably great, and would impose large and unpredictable costs. Somewhat thicker covers than bare (or average) compliance with a 20 pCi/m²s standard would require will, moreover, be called for by the requirement to provide reasonable assurance of compliance. (Other types of control are even more costly and do not provide the comprehensive protection thick covers provide.) Consequently, we have concluded it would be unreasonable to impose a standard below the 20 pCi/m²s required by this rule.

The Agency believes that the standards for the disposal of uranium mill tailings established in this rule provide protection of public health comparable to that which might be established under the Clean Air Act, because the considerations on which these standards are based are comparable to those the Agency uses in establishing standards under Section 112 of the Clean Air Act. However, the final determination will be made in the Section 112 rulemaking on radionuclides.

4. Radon Concentration vs. Emission Rate Limits

A radon emission rate limit was proposed as a design standard for the disposal of tailings. Some commenters suggested that we should instead establish a concentration limit for radon in air at locations where people would be exposed. They expressed the view that EPA should establish standards based on health risk alone and that a concentration limit applied where people can live is therefore more suitable.

A design limit for emissions addresses a primary goal of these standards, the placement of a thick, durable earthen cover over the tailings, because the limit relates directly to the thickness of the cover and requires direct control of radon emissions. It also is in a form which conforms to the requirements of the Clean Air Act, which specifies direct control of emissions from a source. Under the suggested air concentration limit, transport calculations would be needed to estimate emission rates for use in determining cover thicknesses. We believe no purpose

is served by introducing the uncertainty of this extra (transport) variable into the calculations for cover thickness. In addition, the thickness of the cover required to satisfy such a standard could be arbitrarily reduced (to zero in many cases) by use of fences to restrict access. Such a situation would be unsatisfactory because it would: (1) Require permanent (for 1000 years) control of access by institutional means, and (2) would not require a cover sufficient to deter misuse. In summary, if such a standard is comparable to an emission limit, it is needlessly complex, due to the introduction of transport calculations. If not, it affords less protection by permitting dispersion instead of control.

5. Cleanup Standards

Commenters expressed confusion regarding the purpose and applicability of the proposed § 192.32(b)(2). We intended this section to distinguish disposal areas for tailings piles from other land areas on disposal and/or licensed sites that are sufficiently uncontaminated by tailings as to not require application of the disposal standards of § 192.32(a). The definition of "disposal area" and the language of § 192.32(b) have been revised to clarify these objectives.

Some commenters objected to the proposed definition. On the assumption that it was a cleanup standard they argued it is not necessary to clean up land which will be converted to government ownership upon closure, since a government agency could control use of the land. Also, they argued that even if the government allowed use of the land, including residential use, "no reliable evidence exists to indicate that levels exceeding the proposed cleanup standard would necessarily convert to indoor radon daughter exposures of sufficient magnitude to constitute significant health risks."

EPA believes there are good reasons not to leave contaminated land (other than areas meeting the disposal standards) at former milling sites. First, the contamination may spread further, and thereby necessitate cleanup of adjacent land or properties. High indoor radon levels

clearly can result if houses are built on contaminated land. Second, there are significant radiation risks (identified in the FEIS and DEIS) from pathways other than inhalation of indoor radon decay products, including external (gamma) radiation and inhalation of windblown particulates. Finally, the government agency accepting ownership of contaminated land would have to impose additional control and, possibly, incur the costs to maintain such control. EPA has decided not to change the proposed levels which define on-site land that need not satisfy the standards applicable to disposal areas.

Finally, some commenters suggested that we issue standards for the cleanup of any off-site land and buildings that may contain tailings from licensed mills. There was an implication in some comments that establishing the responsibility of any party to perform remedial actions for such sites could be affected by whether or not EPA had issued cleanup standards. EPA has issued cleanup standards (40 CFR Part 192, Subpart B) for the Federal cleanup program for off-site tailings from 24 inactive processing sites that was established under Title I of UMTRCA. Sites for which a license for uranium or thorium production was in effect on or after January 1, 1978, are excluded from coverage under Title I. We note, however, that the standards (40 CFR Part 192, Subpart B) we have already issued for the Title I program would be suitable for application to off-site contamination from active mills.

6. Wet Sites vs. Dry (Arid) Sites

Several commenters from Virginia and Illinois expressed concern regarding the applicability of the standards to wet sites, i.e., locations where annual average precipitation exceeds annual average evapotranspiration. EPA stated in the Federal Register notice accompanying the proposed standards that if uranium mining and milling is conducted in wet regions, the adequacy and appropriateness of the standards may have to be reviewed, particularly the water protection requirements. Based on this statement the commenters were concerned that EPA intended to apply less stringent standards for tailings control at wet sites.

Our remarks concerning wet sites in the preamble for the proposed standards were intended only to acknowledge that all current U.S. uranium mills are located in arid and semi-arid areas, and that we have less experience with many of the control measures needed to comply with the standards under wet than under dry conditions.

We have modified the final standards to require environmental and health protection in all regions of the United States. EPA developed the basic ground water protection provisions in these standards for national application to hazardous waste sites. The New Source Performance Standards, 40 CFR 440.34, protect surface water by prohibiting discharges from new mills except for the amount by which precipitation may exceed evapotranspiration. Any discharged water must satisfy concentration standards corresponding to use of the best available demonstrated treatment technology. We have modified our proposal to not apply the requirements of 40 CFR 264.228 that are referenced by 40 CFR 264.221 ("Design and Operating Requirements") in order to avoid the post-closure "bathtub" effect that could otherwise occur in wet locations. For mills locationed in regions of net precipitation the final standard applies 40 CFR 264.228(a)(2)(iii)(E), which requires the closure cover to be less permeable than any liner beneath the tailings so the pile will not fill with water.

We believe these and the other provisions of the final standards provide adequate protection for wet and dry areas, considering differences in both net precipitation and population density.

C. Ground Water Standards

1. Summary of the Proposed Standards

Consistent with the standards EPA issued under the SWDA for hazardous wastes (47 FR 32274-388, July 26, 1982) the standard for tailings piles has two parts: (1) A "primary" standard that requires use of a liner designed to prevent migration of hazardous substances out of the impoundment, and (2) a "secondary" ground water protection standard requiring, in effect, that any hazardous

constituents that leak from the waste not be allowed to degrade ground water. The primary standard applies to new portions of new or existing waste depositories. The secondary standard applies to new and existing portions, the point of compliance being at the edge of the waste impoundment. The specific hazardous substances and concentrations (i.e., background levels) that define noncompliance with the secondary standard at each site will be established for uranium mill tailings by NRC and Agreement States. The SWDA rules, however, permit alternate concentration limits to be established when they will not pose " * * * a substantial present or potential hazard to human health or the environment" as long as the alternate concentration limit is not exceeded. The rule also allow "hazardous constituents" to be exempted from coverage by the permit based on the same criterion. EPA determines the alternate concentration standard or exemption under the SWDA; EPA's concurrence would be required under the proposed standards for tailings.

EPA recognized in proposing these standards that UMTRCA continues the dual regulatory system for uranium fuel cycle facilities under which EPA sets health and environmental standards and NRC establishes implementing technical, engineering, and management regulations. Under the SWDA, EPA performs all such regulatory functions for chemical hazardous wastes. UMTRCA promotes uniform Federal regulation of wastes, however, by requireing NRC's regulations for these wastes (i.e., uranium and thorium mill tailings) to be "comparable" to requirements EPA establishes for similar hazards under the SWDA.

2. The Primary Standard

The primary standard, 40 CFR 264.221, can usually be satisfied only be using liner materials (such as plastics) that can retain all wastes. Exemptions permitting use of other liner materials (such as clay) that may release water or small quantities of other substances or, in some cases, permitting no liner may be granted only if migration of

hazardous constituents into the ground water or surface water would be prevented indefinitely.

Some commenters stated that no liner technology is available which would achieve the goal of the primary standard, i.e., preventing waste from entering the ground or water. They stated that synthetic liners would tear under the strains of tailings and heavy equipment, or that they could not reliably be properly installed in such large impoundments. Other commenters noted that thicker plastic liners than that have been conventional or double liners would be more successful. A number of commenters argued that clay liners may have important advantages over plastics, but questioned whether clay liners could satisfy the conditions for an exemption.

The rulemaking record does not establish that either clay or plastic liners have unequivocal advantages or disadvantages. EPA considered these technologies when it developed the SWDA liner requirement and decided to require a liner that is capable, as a matter of engineering, of preventing migration of waste into the ground and water. The fact that failures may occur did not justify establishing a less protective standard. Recognizing that such liners may sometimes fail, EPA also issued the secondary standard to limit the consequences of such failures. UMTRCA requires standards for tailings to be consistent with the standards EPA established under SWDA. We have concluded that commenters did not establish that conditions at tailings impoundments are sufficiently different from conditions EPA considered in developing the SWDA standard to justify departures from that standard.

Under these standards, all new waste storage areas (whether new waste facilities or expansions of existing piles) are subject to the primary standard—the liner requirement. If new wastes are added to an existing pile, however, the pile must comply with the secondary standard—the hazardous constituent concentration standards for health and environmental protection. Whether for a new or existing pile, if the secondary standards are found not

to be satisfied and subsequent corrective actions fail to achieve compliance in a reasonable time, the operator must cease depositing waste on that pile.

3. The Secondary Standard and the Complementary Roles of EPA and NRC

Commenters correctly noted that virtually all existing tailings piles have contaminated ground water beyond the edge of their impoundments. The reason is that many of these piles were constructed without liners and before NRC increased regulatory requirements in the late 1970's. NRC's recent regulatory practice has been to require remedial actions on a cost/benefit basis when underground contaminant plumes threaten to degrade or have already degraded the potential usefulness of offsite water.

Many commenters, including NRC, argued that the existing practices for tailings piles sufficiently protect health and the environment. They noted that under the proposed standard virtually all existing mill operations would have to either request exemptions and alternate standards and/or begin remedial actions. Commenters stated that regulating by exceptions is inappropriate. NRC and others further argued that an EPA concurrence role for exemptions and alternative standards that would be invoked at virtually all existing mills was inconsistent with UMTRCA's foreclosure of any EPA permitting for tailings under UMTRCA or SWDA.

We have made modifications of the rule to both improve its administration and clarify its objectives.

EPA considered a wide range of alternatives before adopting the secondary standard, including a policy similar to NRC's. When EPA issued the SWDA rules, it recognized that many existing hazardous waste sites had operated for many years without liners and would not immediately satisfy the secondary standard. EPA created the opportunity for exemptions and alternative concentration standards to avoid remedial actions where such exceptions would "not pose a substantial present or potential hazard." In establishing such exemptions or alternative

standards, the SWDA rules require EPA to consider specified fate-related and health and environment-related factors (see 40 CFR 264.93(b) and 264.94(b)). "Fate" refers to the destiny of contaminants released from the waste under site-specific hydrogeochemical conditions.

EPA agrees that administrative burdens related to the dual regulatory system under UMTRCA should be minimized. We have concluded that it is appropriate under UMTRCA that the regulatory agencies (NRC and Agreement States) perform or approve analyses of fate, because this involves primarily technical and site-specific judgments. EPA does not believe, however, that it can or should delegate its responsibility for setting health and environmental protection standards. This was the reason for proposing to require EPA's concurrence with exemptions and alternative concentration standards recommended by regulatory agencies for site-specific licenses. Therefore, in determining situations requiring concurrence, EPA will consider the health and environment-related factors in §§ 264.93(b) and 264.94(b).

Administrative burdens can be further reduced by permitting the regulatory agency to exercise discretion, pursuant to the requirements of 40 CFR 264.94(b), for establishing alternate concentration limits, as long as any contamination permitted will remain close to the pile and is within the boundaries of the licensed site. Such situations can be identified solely through analysis of fate, and we have decided not to require concurrence in such cases. This avoids the dual administrative process for alternative concentration standards under conditions where they certainly would be requested and granted. We believe this is appropriate. The contamination would be very limited in extent and concentration, can be expected to eventually dissipate after the site is closed in accordance with our closure standard, and these sites will be under effective government jurisdiction during this period. We have chosen 500 meters as the maximum distance for the purpose of this section of the rule, because it limits contamination to a small area, and, considering the size of disposal areas,

will provide an adequate margin of distance to implement corrective action programs if they are required to prevent offsite contamination.

The revised standard for existing piles should be implemented in a manner consistent with the following scenario. Monitoring wells should be established at the edge of the tailings at the compliance point. This monitoring location is unique in providing the earliest practical notice of contaminants migrating from the impoundment. The regulatory agency should determine through further monitoring and fate analysis whether hazardous constituent levels now and in the future will satisfy the secondary standard within 500 meters or any closer site boundary, what corrective actions are appropriate to correct any on-site contamination, and, if some contamination is found to be not practicable to eliminate, the alternate concentration limit at the edge of the tailings to indicate the minimum practicable on-site contamination. If environmental contamination is a realistic possibility (or fact) beyond 500 meters (or the site boundary), remedial actions must be taken, or alternative concentration standards (with EPA concurrence) are required.

Unlike EPA's role in SWDA, EPA's role for controlling hazardous materials from uranium tailings under UMTRCA is limited to setting standards and does not include an implementing responsibility. That responsibility is vested in the NRC and the States as the licensing agencies under Title II of UMTRCA (Section 84a(3)) and will be carried out through regulations set by the NRC, with the concurrence of the Administrator, upon promulgation of these standards by EPA.

Many of the factors that must be considered by NRC in carrying out its responsibilities for enforcing EPA's standards are discussed in the pertinent section of the notice proposing these standards (48 FR 19522-5). For convenience, we repeat here the listing of sections of the SWDA's regulations which relate to the separate EPA and NRC responsibilities. EPA's responsibilities to establish

standards under Section 206 of UMTRCA are carried out through adoption of all or part of the following sections of the SWDA regulations:

i. Subpart F:

40 CFR 264.92 Ground water protection standard

40 CFR 264.93 Hazardous constituents

40 CFR 264.94 Concentration limits

(These three sections are modified and adopted as § 192.32(a)(2))

40 CFR 264.100 Corrective action program

(This section is modified and adopted as § 192.33)

ii. Subpart G:

40 CFR 264.111 Closure performance standard

(This section is adopted as part of § 192.32(b)(1))

iii. Subpart K:

40 CFR 264.221 Design and operating requirements for surface impoundments

(This section is modified and adopted as § 192.32(a)(1))

NRC's responsibilities under UMTRCA are to implement EPA's standards and to "* * * insure that the management of any byproduct material * * * is carried out in such a manner as * * * conforms to general requirements established by the Commission, with the concurrence of the Administrator, which are, to the maximum extent practicable, at least comparable to requirements applicable to the possession, transfer, and disposal of similar hazardous material regulated by the Administrator under the SWDA, as amended." EPA will insure that NRC's regulations satisfy these admonitions through its concurrence role. Relevant SWDA regulations are those embedded in Subparts A (except Section 264.3), B, C, D, E, F, G, H, and K. Examples of areas which NRC must address in discharging these responsibilities involve functions under the six sections listed immediately above which are incorporated into

these EPA standards, and the following sections of the SWDA regulations:

i. Subpart F:

40 CFR 264.91 Reequired programs

40 CFR 264.95 Point of compliance

40 CFR 264.96 Compliance period

40 CFR 264.97 General ground water monitoring requirements

40 CFR 264.98 Detection monitoring program

40 CFR 264.99 Compliance monitoring program

ii. Subpart G:

40 CFR 264.117 Post-closure care and use of property

iii. Subpart K:

40 CFR 264.226 Monitoring and inspection (of impoundment liners), as applicable

40 CFR 264.228 Closure and postclosure care, as applicable.

There are several of these SWDA regulations that specify monitoring after closure of an impoundment. Monitoring is a compliance activity conducted to assure that health and environmental standards are being met. The regulatory agency is responsible for establishing such requirements, including post-closure monitoring consistent with the SWDA regulations. The period over which post-closure monitoring is normally required under SWDA is 30 years. The regulatory agency should recognize, however, that monitoring of ground water for shorter or longer periods may be needed for the specific sites where tailings are located and, when appropriate, change this requirement.

A difficult consideration regarding the closure of a tailings impoundment is deciding when disposal must take place. Several factors must be evaluated in this regard, including: (1) The likelihood that a mill will resume op-

erations; (2) the specific condition of the tailings impoundment, such as the fraction of design life remaining, and environmental contamination problems, such as windblown tailings and the likelihood that significant quantities of tailings might be spread by flooding; and (3) the cost of maintaining releases from the inactive pile in conformance with the regulations which apply to operating mills prior to disposal (including maintaining radon emissions at ALARA levels). Evaluating these factors may be difficult and complex. However, although an adequate drying-out period makes possible long-term isolation of the tailings and stabilization of the piles, radon emissions will be greater during this period than before or after disposal. For this reason the regulatory agency should require, once a pile is allowed to begin to dry out, that disposal proceeds in an expeditious fashion, and that new liquids are not introduced to the pile so that a new drying-out period will be incurred.

The period required for the tailings to dry out is highly dependent on local meteorology. This precludes establishing a single fixed time for disposal of the tailings. We have concluded that the regulatory agency should exercise the responsibility of determining when disposal should occur, by site-specifically judging the advantages and detriments associated with all pertinent factors. This responsibility is governed by the need to conform to regulations established to satisfy the SWDA, by 40 CFR Part 190, and by the ALARA requirement on radon emissions.

NRC's closure regulations must be comparable, to the maximum extent practicable, to requirements under the SWDA, wherein short closure periods (90 and 180 days) are specified. Drying out of piles will take much longer. However, disposal should occur promptly when piles are allowed to dry out. In addition, some of the older mill sites already contain essentially completed (filled) tailings piles. The regulatory agency should promptly identify and require disposal of such tailings.

EPA and NRC are coordinating their efforts to insure health and environmental protection from uranium by-

product materials. In particular, we are working closely with the NRC to assure that NRC's general requirements for ground water protection will be comparable, to the maximum extent practicable, to EPA's requirements under the SWDA for similar hazardous materials.

4. Timing of Corrective Actions

The proposed standard requires corrective actions for ground water to be initiated within one year after a noncompliance determination is made. Commenters expressed concern that it may take longer than one year to devise and implement an effective corrective action, for both technical and administrative reasons. Based on these considerations, EPA has revised the time limit for implementation of corrective actions to eighteen (18) months. We also note that § 264.99 of SWDA regulations require submission of corrective action plan within 180 days. This provision remains unaffected by the above revision.

Once corrective actions have begun, the regulatory agency should evaluate their effectiveness and determine whether to continue, alter, or discontinue the actions. Because corrective actions are very site-specific such determinations cannot be made under the same uniform, preestablished schedule for all sites. It is the regulatory agency's responsibility, however, to assure that necessary decisions are rendered in a timely fashion. Acceptable plans for corrective actions should offer a high likelihood of achieving compliance with the standards. Furthermore, corrective actions which, once begun, show inadequate promise of achieving compliance should result in the regulatory agency's promptly disallowing the addition of new tailings to a noncomplying tailings pile.

5. Nonhazardous Materials

Comments were received on two matters regarding the contamination of ground water by nonhazardous materials. (They include chlorides, sulfates, manganese, and total dissolved solids, amoung others.) At high concentrations, these

materials can make water unfit for use for other than health related reasons.

One view of these materials held that several of them are more mobile than hazardous materials. Thus, they precede the hazardous material in contaminating ground water. Ground water monitoring for these materials allows the prediction of future ground water contamination by hazardous materials. This detection scheme might therefore provide an early warning of ground water contamination and allow early corrective actions to be taken, thereby effectively preventing ground contamination by hazardous materials.

EPA agrees with this comment. Analyzing water samples for the substances from tailings that are expected to be most mobile in a given ground water environment is a very useful feature of site-specific monitoring requirements. We note that § 264.98 already contains such a requirement and that the implementing regulatory agencies may be expected to establish such (or comparable) requirements.

A second view held that much of the ground water in the Western States is already contaminated with nonhazardous materials to an extent that it is unsuitable for use. These are primarily shallow aquifers (or uppermost aquifers) which would be the first to be contaminated by tailings materials. Since these ground waters are already contaminated, the argument goes, there is no need to prevent additional contamination.

This comment would require changing the ground water protection policy EPA has established for hazardous wastes under the SWDA rules. UMTRCA requires standards for tailings to be consistent with the SWDA standards. EPA has already considered the views expressed in these comments when it established its policy under the SWDA (47 FR at 32286, July 26, 1982). We do not think this rulemaking for byproduct materials is an appropriate forum in which to reconsider EPA's policies for hazardous wastes.

6. Neutralization of Tailings

Some commenters recommended that EPA require neutralization of tailings as a method to protect ground water. Neutralization is chemical treatment that would make the tailings neither acid nor alkaline. When tailings are neutralized many hazardous constituents are taken out of solution and thereby are less prone to move through the earth and into ground water.

An EPA study of tailings neutralization in 1980, discussed in the FEIS, identified several issues regarding neutralization. First, some of the hazardous constituents in tailings form complex compounds that remain in solution over wide ranges of acidity and alkalinity. Selenium, arsenic, and molybdenum—all constituents of tailings—are particularly troublesome in this regard. Adequate control would require careful operation of the neutralization process. Second, the costs of neutralizing the tailings are significant, about the same as installation of a liner. Most of the cost is due to the need for a sludge storage lagoon. Finally, neutralization would not preclude the need for a liner.

The structure of regulation established by UMTRCA consists of generally applicable environmental standards established by EPA and regulations to implement these by NRC. Requirements for specific control methods, such as neutralization, are left to the implementing agency, to be used, as required, to ensure that EPA's general standards are satisfied. In view of the above, EPA has concluded that a standard requiring neutralization of tailings is inappropriate.

D. Procedural Issues

1. Molybdenum and Uranium Improperly Listed Under SWDA Requirements

Comments were received stating EPA improperly proposed listing molybdenum and uranium as hazardous constituents, because SWDA listing procedures were not followed.

EPA listed molybdenum and uranium as hazardous constituents only for purposes of controlling uranium and thorium byproduct materials. EPA does not intend in this rulemaking to add molybdenum and uranium to the SWDA list of hazardous constituents, 40 CFR part 261, Appendix VIII. Therefore, the procedure we followed is proper. Clarification of this matter has been added to § 192.32(a)(2) of the final standard.

2. Inclusion of Thorium in the Standards

Several commenters pointed out that the DEIS contained no background supporting information for the thorium standards (Subpart E) and recommended deleting the thorium standards from this rule. Commenters also stated that there are significant differences in the physical and chemical characteristics and the radiological risk between uranium and thorium. They concluded, therefore, the EPA should not substitute the same requirements for thorium as for uranium, as was proposed.

The FEIS contains appropriate discussions of thorium and a review of the implications of the radiological differences between thorium and uranium for the level of protection provided, the cost of control, and the feasibility of implementation of these standards. These effects are sufficiently small for EPA to conclude that the thorium standards should be promulgated as proposed.

IV. Regulatory Impact Analysis

Under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. We have not classified this rule as major, since it will not cause significantly large incremental costs above those which must be incurred in the absence of these regulations. We have prepared a Regulatory Impact Analysis (RIA), however, since there are wide variations in views on the extent of needed environmental controls in the uranium industry.

A. Benefit-Cost Analysis

The RIA examines the benefits and costs of selected alternative disposal standards, for both existing and new

tailings piles. As discussed earlier, most of the benefits of tailings disposal cannot be quantified. The benefit we are best able to estimate is the number of lung cancer deaths avoided by controlling the radon emanation from tailings piles. Since the other benefits of disposal—prevention of misuse, ground water protection and prevention of the surface spread of tailings—cannot be quantified (let alone monetized), we could not make a completely numerical determination, within the traditional benefit-cost analysis framework.

We first performed a partial benefit-cost analysis of alternative disposal standards by relating the disposal costs for each alternative to the health effect estimates for direct radon emissions alone. Although this analysis relates only one category of benefit to the entire cost of disposal, it provides useful results to the extent that these benefits are found to be greater than the total cost of control. Second, we performed a cost-effectiveness analysis of alternative standards which assigns different sets of arbitrary weights to the entire range of benefits of tailings disposal. To perform this analysis, we also developed an index which quantifies the relative effectiveness of the disposal methods in providing designated types of control which correspond to the benefit categories. The cost-effectiveness analysis does not address whether the cost increases of tighter controls are worth incurring. Rather, by examining the sensitivity of the results to different choices of weighting schemes for the various benefits, in addition to identifying at what level additional gains in effectiveness start becoming increasingly more expensive, it points out to what degree the choice of standards is sensitive to the relative importance assigned to different types of benefits. Based in part on these analyses, we have made a qualitative judgment that the societal benefits of the standards outweigh the societal costs, considering the long-term continuing train of benefits to society from isolating these hazardous materials from man and the environment.

A range of alternatives was evaluated for protection of public health and the environment. These alternatives in-

cluded a range of control methods from no control to high levels of control and are summarized below. They do not include different levels of ground water protection, since those requirements must be consistent with standards already established under the SWDA. However, the length of time ground water is expected to be protected is indicated in the assessment of benefits.

Brief descriptions of each alternative follow:

Alternative A. This is the "no standards" case and represents the reference case representing conditions if nothing is done. The piles would remain hazardous for a long time, taking about 265,000 years for the radioactivity to decay to 10 percent of current levels. The radon emission rate is estimated to be 400 pCi/m^{2}s from a typical pile. The background rate for typical soils is about 1 pCi/m^{2}s. The concentration of some toxic chemicals in the tailings is hundreds of times background levels in ordinary soils, so that the potential for contaminating water and land is present and continues indefinitely.

Alternative B. These are "institutional care" cases and represent situations in which maintenance is required to assure the standard is satisfied. B1 specifies no radon emission limit, but requires control of wind-blown tailings and gamma radiation. B2 specifies radon control limits of 60 pCi/m^{2}s and B3 specifies 20 pCi/m^{2}s; both require control of wind-blown tailings and gamma radiation.

Alternative C. These are "long-term passive control" cases and represent situations in which design is for long-term protection using engineered, passive methods requiring no continued maintenance. The radon emission limits examined are:

C1 none
C2 60 pCi/m^{2}s
C3 20 pCi/m^{2}s
C4 6 pCi/m^{2}s
C5 2 pCi/m^{2}s

Disposal methods would be designed to be effective for 1000 years in this case, in addition to providing control of wind-blown tailings and gamma radiation.

Alternative D. These cases assume staged disposal. They do not require continued maintenance and achieve control similar to Alternative C, plus improved control of radon during operations at new tailings piles. The radon emission limits examined are:

D2 60 pCi/m^{2}s
D3 20 pCi/m^{2}s
D4 6 pCi/m^{2}s
D5 2 pCi/m^{2}s

Disposal methods would be designed to be effective for 1000 years in this case, in ddition to controlling wind-blown tailings and gamma radiation. Further, additional control of radon is achieved during the operational period at new tailings piles through use of staged disposal.

The costs and the benefits for these alternatives are listed in the accompanying tables. We examined the cost per death avoided from radon emissions for alternative control levels from several viewpoints. This range of viewpoints included the length of time over which health effects should be related to costs and whether nationwide population effects should be included with regional population effects in making benefit-cost comparisons. We conclude that the incremental cost per radon death avoided at a 20 pCi/m^{2}s emission limit is a reasonable expenditure under all scenarios. The range of incremental costs per death avoided at this control level is from $130,000 (nationwide health effects estimated for 1000 years) to $2.5 million (regional health effects estimated for only 100 years). For the next, more stringent, level of control, 6 pCi/m^{2}s, the incremental costs are also higher: $630,000 to $12 million per radon death avoided. These costs are more uncertain and more likely to have been underestimated. For the next, less stringent, level of control, 60 pCi/m^{2}s, the incremental costs are lower: $70,000 to $1.4 million. Whether or not the expenditure for a control level is acceptable depends on one's view of the relevant factors to be con-

sidered in valuing the benefit stream. On a relative basis, the incremental cost increases by at least a factor of 5 for going from the 20 pCi/m^{2}s limit to 6 pCi/m^{2}s, and increase by only a factor of 2 for going from 60 pCi/m^{2}s to 20 pCi/m^{2}s.

The results of our cost-effectiveness analyses, which incorporate different weighting schemes for all the benefits of disposal, indicate that the incremental costs per unit of overall effectiveness are relatively insensitive to the choice of weighting of benefits. The cost-effectiveness of obtaining increased benefits beyond 60 pCi/m^{2}s decreases monotonically by up to factors of two for each incremental level of control for all weighting schemes examined.

B. Economic Impact Analysis

In the RIA, we developed cases for analyzing the industry-wide costs and economic impacts associated with tailings disposal methods assumed to be required for compliance with the alternative standards. Each case represented a different combination of disposal methods applied to both existing and new tailings. The estimated economic impacts include potential mill closures (on a model mill basis) and uranium price increases. We estimated the impacts for each case according to different financial scenarios and different assumptions on the ability of companies to pass-through tailings disposal costs to their customers. The results from this analysis are used to represent the costs and impacts of the proposed standards.

We estimate that compliance with the standards, if other regulatory requirements did not exist, would cost the uranium milling industry about 260 million dollars for all tailings which exist today at licensed sites. If we include all those tailings which we estimate will be generated by the year 2000, based on recent DOE projections, the total cost to the uranium milling industry would be from 310 to 540 million dollars. These costs are present worth estimates (discounted at a 10 percent rate) expressed on a 1983 constant dollar basis. The range in cost is due to different assumptions on what actions are needed to meet require-

ments for ground water protection for new tailings at existing mills.

We estimate that increases in the price of uranium could range from 2 to 7 percent. In light of the currently poor economic condition of the industry and the threat of foreign competition, it is unlikely that mills will be able to pass through substantial portions of the disposal costs. Using our models and under the assumption of an average cash flow, we estimate that if mills are forced to absorb the entire cost of disposal, no mills would cease operation due to these standards. Under the conditions of no pass-through and lower cash-flow, one small model mill may close. However, we estimate that this closure can be avoided with the limited price pass-through stated above.

These costs and economic impacts are not all attributable to these standards, since some of these costs would probably occur in the absence of these standards due to other regulatory requirements at most sites. These include existing NRC licensing regulations and requirements established by agreement States, and regulations required under Section 84(a)(1) and (3) of UMTRCA. We did not estimate the costs imposed by these other requirements because that would require a site-specific investigation and these requirements have been continuously changing in the past few years (mostly toward more stringent requirements). Therefore, we could only estimate the upper bounds of cost and economic impacts imposed by these standards, and could not estimate the net impact of the standards.

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291. We believe the analysis discussed above complies with the intent of the Order. Any comments from OMB to EPA and any EPA response to those comments are available for public inspection at the docket cited above under **"ADDRESSES."**

C. Regulatory Flexibility Analysis

This regulation would not have a significant impact on a substantial number of small entities, as specified under

Section 605 of the Regulatory Flexibility Act (RFA). Therefore, we have not performed a Regulatory Flexibility Analysis. The basis for this finding is that of the 27 licensed uranium mills, only one qualifies as a small entity and this mill will not be impacted by the standards. Almost all the mills are owned by large corporations. Three of the mills are partly-owned by companies that could qualify as small businesses, according to the Small Business Administration generic small entity definition of 500 employees. However, under the RFA, a small business is one that is independently owned and operated. Since these three mills are not independently owned by small businesses, they are not small entities.

D. OMB Regulations on the Paperwork Reduction Act

This rule does not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980 U.S.C. 3501, et seq.

TABLE I—COSTS OF ALTERNATIVE STANDARDS FOR TAILINGS CONTROL TO THE YEAR 2000

(MILLIONS OF 1983 DOLLARS)

Alternative standard	Present Worth Costs (10 percent discount rate)(*)		Total cost
	Existing tailings	Future tailings	
A	0	1	1
B1	117	83	200
B2	192	95	287
B3	256	111	367
C1	115	95	210
C2	192	112	304
C3	260	128	388
C4	336	146	482
C5	403	165	568
D2	192	156	348
D3	260	160	430
D4	336	186	522
D5	403	204	607

* These cost estimates assume that two-thirds of the future tailings generated at existing mills will be placed in existing impoundments and the other one-third will be placed in new, lined, impoundments. We assume that the average radium contents of existing and future tailings is 400 pCi/g. These costs are our best estimates, but their uncertainty increases as the level of required radon control increases.

Table II—Benefits of Alternative Standards for Tailings Control to the Year 2000[a]

Stabilization			Radon Control			Water protection
Alternative standard	Chance of misuse	Erosion avoided (y)	Maximum risk [b] of lung cancer (percent reduction)	Deaths avoided: First 100 years	Deaths avoided: Total	longevity (y)
A	Verely likely	0	2 in 10^2(0)	0	0	0
B1	Likely	Hundreds	1 in 10^2(50)	300	1,000	100
B2	Less likely	do	4 in 10^3(80)	480	1,500	100
B3	do	do	1 in 10^3(95)	570	2,000	100
C1	Likely	Thousands	1 in 10^2(50)	300	Thousands	100
C2	Less likely	do	4 in 10^3(80)	480	Many thousands	Hundreds
C3	Unlikely	do	1 in 10^3(95)	570	Tens of thousands	1,000
C4	Very likely	Many thousands	3 in 10^4(98.5)	590	do	1,000
C5	do	do	1 in 10^4(99.5)	597	do	1,000
D2	Unlikely	Thousands	4 in 10^3(80)	480	Several thousands	1,000
D3	do	Many thousands	1 in 10^3(95)	570	Tens of thousands	1,000
D4	Very likely	do	3 in 10^4(98.5)	590	do	1,000
D5	do	do	1 in 10^4(99.5)	597	do	1,000

[a] These estimates include the benefits resulting from control of 26 existing piles and 9 projected new piles. No credit is taken for any engineering safety factors incorporated to provide the required "reasonable assurance" of conformance.

[b] Lifetime risk of fatal cancer to an individual assumed to be living 600 meters from center of a model tailings pile.

This standard is promulgated on the date signed.

List of Subjects in 40 CFR Part 192

Air pollution control, Radiation protection, Hazardous materials, Uranium, Environmental protection, Hazardous constituents, Groundwater protection, Radon, Radium, and Thorium.

Dated: September 30, 1983.

William D. Ruckelshaus,

Administrator.

In 40 CFR Chapter I, Part 192 is amended by adding Subparts D and E as follows:

PART 192—HEALTH AND ENVIRONMENTAL PROTECTION STANDARDS FOR URANIUM AND THORIUM MILL TAILINGS

* * * * *

Subpart D—Standards for Management of Uranium Byproduct Materials Pursuant to Section 84 of the Atomic Energy Act of 1954, as Amended

Sec.

192.30 Applicability.
192.31 Definitions and Cross-references.
192.32 Standards.
192.33 Corrective Action Programs.
192.34 Effective Date.

Subpart E—Standards for Management of Thorium Byproduct Materials Pursuant to Section 84 of the Atomic Energy Act of 1954, as Amended

192.40 Applicability.
192.41 Provisions.
192.42 Substitute Provisions.
192.43 Effective Date.

Authority: Sec. 275 of the Atomic Energy Act of 1954, 42 U.S.C. 2022, as added by the Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. 95-604, as amended.

* * * * *

Subpart D—Standards for Management of Uranium Byproduct Materials Pursuant to Section 84 of the Atomic Energy Act of 1954, as Amended

§ 192.30 Applicability.

This subpart applies to the management of uranium byproduct materials under Section 84 of the Atomic Energy Act of 1954 (henceforth designated "the Act"), as amended, during and following processing of uranium ores, and to restoration of disposal sites following any use of such sites under Section 83(b)(1)(B) of the Act.

§ 192.31 Definitions and Cross-references.

References in this subpart to other parts of the Code of Federal Regulations are to those parts as codified on January 1, 1983.

(a) Unless otherwise indicated in this subpart, all terms shall have the same meaning as in Title II of the Uranium Mill Tailings Rediation Control Act of 1978, Subparts A and B of this part, or Parts 190, 260, 261, and 264 of this chapter. For the purposes of this subpart, the terms "waste," "hazardous waste," and related terms, as used in Parts 260, 261, and 264 of this chapter shall apply to byproduct material.

(b) *Uranium byproduct material* means the tailings or wastes produced by the extraction or concentration of uranium from any ore processed primarily for its source material content. Ore bodies depleted by uranium solution extraction operations and which remain underground do not constitute "byproduct material" for the purpose of this Subpart.

(c) *Control* means any action to stabilize, inhibit future misuse of, or reduce emissions or effluents from uranium byproduct materials.

(d) *Licensed site* means the area contained within the boundary of a location under the control of persons generating or storing uranium byproduct materials under a license issued pursuant to Section 84 of the Act. For purposes of this subpart, "licensed site" is equivalent to "regulated unit" in Subpart F of Part 264 of this chapter.

(e) *Disposal site* means a site selected pursuant to Section 83 of the Act.

(f) *Disposal area* means the region within the perimeter of an impoundment or pile containing uranium by product materials to which the post-closure requirements of § 192.32(b)(1) of this subpart apply.

(g) *Regulatory agency* means the U.S. Nuclear Regulatory Commission.

(h) *Closure period* means the period of time beginning with the cessation, with respect to a waste impoundment, of uranium ore processing operations and ending with completion of requirements specified under a closure plan.

(i) *Closure plan* means the plan required under § 264.112 of this chapter.

(j) *Existing portion* means that land surface area of an existing surface impoundment on which significant quantities of uranium byproduct materials have been placed prior to promulgation of this standard.

§ 192.32 Standards.

(a) *Standards for application during processing operations and prior to the end of the closure period.* (1) Surface impoundments (except for an existing portion) subject to this subpart must be designed, constructed, and installed in such manner as to conform to the requirements of § 264.221 of this chapter, except that at sites where the annual precipitation falling on the impoundment and any drainage area contributing surface runoff to the impoundment is less than the annual evaporation from the impoundment, the requirements of § 264.228(a)(2)(iii)(E) referenced in § 264.221 do not apply.

(2) Uranium byproduct materials shall be managed so as to conform to the ground water protection standard in § 264.92 of this chapter, except that for the purposes of this subpart:

(i) To the list of hazardous constituents referenced in § 264.93 of this chapter are added the chemical elements molybdenum and uranium,

(ii) To the concentration limits provided in Table 1 of § 264.94 of this chapter are added the radioactivity limits in Table A of this subpart,

(iii) Detection monitoring programs required under § 264.98 to establish the standards required under § 264.92 shall be completed within one (1) year of promulgation,

(iv) The regulatory agency may establish alternate concentration limits (to be satisfied at the point of compliance specified under § 264.95) under the criteria of § 264.94(b), provided that, after considering practicable corrective actions, these limits are as low as reasonably achievable, and that, in any case, the standards of § 264.94(a) are satisfied at all points at a greater distance than 500 meters from the edge of the disposal area and/or outside the site boundary, and

(v) The functions and responsibilities designated in Part 264 of this chapter as those of the "Regional Administrator" with respect to "facility permits" shall be carried out by the regulatory agency, except that exemptions of hazardous constituents under § 264.93 (b) and (c) of this chapter and alternate concentration limits established under § 264.94 (b) and (c) of this chapter (except as otherwise provided in § 192.32(a)(2)(iv)) shall not be effective until EPA has concurred therein.

(3) Uranium byproduct materials shall be managed so as to conform to the provisions of:

(a) Part 190 of this chapter, "Environmental Radiation Protection Standards for Nuclear Power Operations" and

(b) Part 440 of this chapter, "Ore Mining and Dressing Point Source Category: Effluent Limitations Guidelines and

New Source Performance Standards, Subpart C, Uranium, Radium, and Vanadium Ores Subcategory."

(4) The regulatory agency, in conformity with Federal Radiation Protection Guidance (FR, May 18, 1960, pgs. 4402-3), shall make every effort to maintain radiation doses from radon emissions from surface impoundments of uranium byproduct materials as far below the Federal Radiation Protection Guides as is practicable at each licensed site.

(b) *Standards for application after the closure period.* At the end of the closure period:

(1) Disposal areas shall each comply with the closure performance standard in § 264.111 of this chapter with respect to nonradiological hazards and shall be designed[1] to provide reasonable assurance of control of radiological hazards to

(i) Be effective for one thousand years, to the extent reasonably achievable, and, in any case, for at least 200 years, and,

(ii) Limit releases of radon-222 from uranium byproduct materials to the atmosphere so as to not exceed an average[2] release rate of 20 picocuries per square meter per second (pCi/m^2s).

(2) The requirements of Section 192.32(b)(1) shall not apply to any portion of a licensed and/or disposal site which contains a concentration of radium-226 in land, averaged over areas of 100 square meters, which, as a result

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[1]The standard applies to design. Monitoring for radon-222 after installation of an appropriately designed cover is not required.

[2]This average shall apply to the entire surface of each disposal area over periods of at least one year, but short compared to 100 years. Radon will come from both uranium byproduct materials and from covering materials. Radon emissions from covering materials should be estimated as part of developing a closure plan for each site. The standard, however, applies only to emissions from uranium byproduct materials to the atmosphere.

of uranium byproduct material, does not exceed the background level by more than:

(i) 5 picocuries per gram (pCi/g), averaged over the first 15 centimeters (cm) below the surface, and

(ii) 15 pCi/g, averaged over 15 cm thick layers more than 15 cm below the surface.

§ 192.33 Corrective Action Programs.

If the ground water standards established under provisions of Section 192.32(a)(2) are exceeded at any licensed site, a corrective action program as specified in 264.100 of this chapter shall be put into operation as soon as is practicable, and in no event later than eighteen (18) months after a finding of exceedance.

§ 192.34 Effective date.

Subpart D shall be effective December 6, 1983.

TABLE A

	pCi/liter
Combined radium-226 and radium-228	5
Gross alpha-particle activity (excluding radon and uranium)	15

Subpart E—Standards for Management of Thorium Byproduct Materials Pursuant to Section 84 of the Atomic Energy Act of 1954, as Amended

§ 192.40 Applicability.

This subpart applies to the management of thorium byproduct materials under Section 84 of the Atomic Energy Act of 1954, as amended, during and following processing of thorium ores, and to restoration of disposal sites following any use of such sites under Section 83(b)(1)(B) of the Act.

(a) Provisions applicable to the element uranium shall also apply to the element thorium;

(b) Provisions applicable to radon-222 shall also apply to radon-220; and

(c) Provisions applicable to radium-226 shall also apply to radium-228.

(d) Operations covered under § 192.32(a) shall be conducted in such a manner as to provide reasonable assurance that the annual dose equivalent does not exceed 25 millirems to the whole body, 75 millirems to the thyroid, and 25 millirems to any other organ of any member of the public as a result of exposures to the planned discharge of radioactive materials, radon-220 and its daughters excepted, to the general environment.

§ 192.42 Substitute provisions.

The regulatory agency may, with the concurrence of EPA, substitute for any provisions of § 192.41 of this subpart alternative provisions it deems more practical that will provide at least an equivalent level of protection for human health and the environment.

§ 192.43 Effective date.

Subpart E shall be effective December 6, 1983.

REORGANIZATION PLAN NO. 3 OF 1970

Eff. Dec. 2, 1970, 35 F.R. 15623, 84 Stat. 2086
Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, July 9, 1970, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code.

ENVIRONMENTAL PROTECTION AGENCY

Section 1. Establishment of Agency

(a) There is hereby established the Environmental Protection Agency, hereinafter referred to as the "Agency."

(b) There shall be at the head of the Agency the Administrator of the Environmental Protection Agency, hereinafter referred to as the "Administrator." The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313).

(c) There shall be in the Agency a Deputy Administrator of the Environmental Protection Agency who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level III of the Executive Schedule Pay Rates (5 U.S.C. 5314). The Deputy Administrator shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.

(d) There shall be in the Agency not to exceed five Assistant Administrators of the Environmental Protection Agency who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate now or hereafter provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315). Each Assistant Administrator shall perform such

functions as the Administrator shall from time to time assign or delegate.

Sec. 2. Transfers to Environmental Protection Agency

(a) There are herby transferred to the Administrator:

(1) All functions vested by law in the Secretary of the Interior and the Department of the Interior which are administered through the Federal Water Quality Administration, all functions which were transferred to the Secretary of the Interior by Reorganization Plan No. 2 of 1966 (80 Stat. 1608), and all functions vested in the Secretary of the Interior or the Department of the Interior by the Federal Water Pollution Control Act or by provisions of law amendatory or supplementary thereof [see 33 U.S.C. 1251 et seq.]

(2)(i) The functions vested in the Secretary of the Interior by the Act of August 1, 1958, 72 Stat. 479, 16 U.S.C. 742d-1 (being an Act relating to studies on the effects of insecticides, herbicides, fungicides, and pesticides upon the fish and wildlife resources of the United States), and (ii) the functions vested by law in the Secretary of the Interior and the Department of the Interior which are administered by the Gulf Breeze Biological Laboratory of the Bureau of Commercial Fisheries at Gulf Breeze, Florida.

(3) The functions vested by law in the Secretary of Health, Education, and Welfare or in the Department of Health, Education, and Welfare which are administered through the Environmental Health Service, including the functions exercised by the following components thereof:

(i) The National Air Pollution Control Administration,

(ii) The Environmental Control Administration:

(A) Bureau of Solid Waste Management,

(B) Bureau of Water Hygiene,

(C) Bureau of Radiological Health,

except that functions carried out by the following components of the Environmental Control Administration of the Environmental Health Service are not transferred: (i)

Bureau of Community Environmental Management, (ii) Bureau of Occupational Safety and Health, and (iii) Bureau of Radiological Health, insofar as the functions carried out by the latter Bureau pertain to (A) regulation of radiation from consumer products, including electronic product radiation, (B) radiation as used in the healing arts, (C) occupational exposures to radiation, and (D) research, technical assistance, and training related to clauses (A), (B), and (C).

(4) The functions vested in the Secretary of Health, Education, and Welfare of establishing tolerances for pesticide chemicals under the Federal Food, Drug, and Cosmetic Act, as amended, 21 U.S.C. 346, 346a, and 348, together with authority, in connection with the functions transferred, (i) to monitor compliance with the tolerances and the effectiveness of surveillance and enforcement, and (ii) to provide technical assistance to the States and conduct research under the Federal Food, Drug, and Cosmetic Act, as amended [21 U.S.C. 301 et seq.], and the Public Health Service Act, as amended [42 U.S.C. 201 et seq.].

(5) So much of the functions of the Council on Environmental Quality under section 204(5) of the National Environmental Policy Act of 1969 (Public Law 91-190 approved January 1, 1970, 83 Stat. 855) [42 U.S.C. 4344(5)], as pertains to ecological systems.

(6) The functions of the Atomic Energy Commission under the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.], administered through its Division of Radiation Protection Standards, to the extent that such functions of the Commission consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material. As used herein, standards mean limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material.

(7) All functions of the Federal Radiation Council (42 U.S.C. 2021(h)).

(8)(i) The functions of the Secretary of Agriculture and the Department of Agriculture under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 135-135k) [7 U.S.C. 136 et seq.], (ii) the functions of the Secretary of Agriculture and the Department of Agriculture under section 408(l) of the Federal Food, Drug, and Cosmetic Act, as amended (21 U.S.C. 346a(l)), and (iii) the functions vested by law in the Secretary of Agriculture and the Department of Agriculture which are administered through the Environmental Quality Branch of the Plant Protection Division of the Agricultural Research Service.

(9) So much of the functions of the transferor officers and agencies referred to in or affected by the foregoing provisions of this section as is incidental to or necessary for the performance by or under the Administrator of the functions transferred by those provisions or related primarily to those functions. The transfers to the Administrator made by this section shall be deemed to include the transfer of (1) authority, provided by law, to prescribe regulations relating primarily to the transferred functions, and (2) the functions vested in the Secretary of the Interior and the Secretary of Health, Education, and Welfare by section 169(d)(1)(B) and (3) of the Internal Revenue Code of 1954 (as enacted by section 704 of the Tax Reform Act of 1969, 83 Stat. 668); but shall be deemed to exclude the transfer of the functions of the Bureau of Reclamation under section 3(b)(1) of the Water Pollution Control Act (33 U.S.C. [former] 466a(b)(1)).

(b) There are hereby transferred to the Agency:

(1) From the Department of the Interior, (i) the Water Pollution Control Advisory Board (33 U.S.C. [former] 466f) [see 33 U.S.C. 1363], together with its functions, and (ii) the hearing boards provided for in sections 10(c)(4) and 10(f) of the Federal Water Pollution Control Act, as amended (33 U.S.C. [former] 466g(c)(4); 466g(f)). The functions of the Secretary of the Interior with respect to being or designating the Chairman of the Water Pollution Control Advisory Board are hereby transferred to the Administrator.

(2) From the Department of Health, Education, and Welfare, the Air Quality Advisory Board (42 U.S.C. 1857e)

[42 U.S.C. 7417], together with its functions. The functions of the Secretary of Health, Education, and Welfare with respect to being a member and the Chairman of that Board are hereby transferred to the Administrator.

Sec 3. Performance of Transferred Functions

The Administrator may from time to time make such provisions as he shall deem appropriate authorizing the performance of any of the functions transferred to him by the provisions of this reorganization plan by any other officer, or by any organizational entity or employee, of the Agency.

Sec. 4. Incidental Transfers

(a) So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with the functions transferred to the Administrator or the Agency by this reorganization plan as the Director of the Office of Management and Budget shall determine shall be transferred to the Agency at such time or times as the Director shall direct.

(b) Such further measures and dispositions as the Director of Office of Management and Budget shall deem to be necessary in order to effectuate the transfers referred to in subsection (a) of this section shall be carried out in such manner as he shall direct and by such agencies as he shall designate.

Sect. 5. Interim Officers

(a) The President may authorize any person who immediately prior to the effective date of this reorganization plan held a position in the executive branch of the Government to act as Administrator until the office of Administrator is for the first time filled pursuant to the provisions of this reorganization plan or by recess appointment, as the case may be.

(b) The President may similarly authorize any such person to act as Deputy Administrator, authorize any such person to act as Assistant Administrator, and authorize any such person to act as the head of any principal constituent organizational entity of the Administration.

(c) The President may authorize any person who serves in an acting capacity under the foregoing provisions of this section to receive the compensation attached to the office in respect of which he so serves. Such compensation, if authorized, shall be in lieu of, but not in addition to, other compensation from the United States to which such person may be entitled.

Sec. 6. Abolitions

(a) Subject to the provisions of this reorganization plan, the following, exclusive of any functions, are hereby abolished:

(1) The Federal Water Quality Administration in the Department of the Interior (33 U.S.C. [former] 466-1).

(2) The Federal Radiation Council (73 Stat. 690; 42 U.S.C. 2021(h)).

(b) Such provisions as may be necessary with respect to terminating any outstanding affairs shall be made by the Secretary of the Interior in the case of the Federal Water Quality Administration and by the Administrator of General Services in the case of the Federal Radiation Council.

Sec. 7. Effective Date

The provisions of this reorganization plan shall take effect sixty days after the date they would take effect under 5 U.S.C. 906(a) in the absence of this section.

Message of the President

To the Congress of the United States:

I transmit herewith Reorganization Plan No. 3 of 1970, prepared in accordance with chapter 9 of title 5 of the

United States Code and providing for an Environmental Protection Agency. My reasons for transmitting this plan are stated in a more extended accompanying message.

After investigation, I have found and hereby declare that each reorganization included in Reorganization Plan No. 3 of 1970 is necessary to accomplish one or more of the purposes set forth in section 901(a) of title 5 of the United States Code. In particular, the plan is responsive to section 901(a)(1), "to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;" and section 901(a)(3), "to increase the efficiency of the operations of the Government to the fullest extent practicable."

The reorganizations provided for in the plan make necessary the appointment and compensation of new officers as specified in section 1 of the plan. The rates of compensation fixed for these officers are comparable to those fixed for other officers in the executive branch who have similar responsibilities.

Section 907 of title 5 of the United States Code will operate to preserve administrative proceedings, including any public hearing proceedings, related to the transferred functions, which are pending immediately prior to the taking effect of the reorganization plan.

The reorganization plan should result in more efficient operation of the Government. It is not practical, however, to itemize or aggregate the exact expenditure reductions which will result from this action.

RICHARD NIXON

THE WHITE HOUSE, July 9, 1970.

Message of the President

To the Congress of the United States:

As concern with the condition of our physical environment has intensified, it has become increasingly clear that

we need to know more about the total environment—land, water and air. It also has become increasingly clear that only by reorganizing our Federal efforts can we develop that knowledge, and effectively ensure the protection, development and enhancement of the total environment itself.

The Government's environmentally-related activities have grown up piecemeal over the years. The time has come to organize them rationally and systematically. As a major step in this direction, I am transmitting today two reorganization plans: one to establish an Environmental Protection Agency, and one to establish, within the Department of Commerce, a National Oceanic and Atmospheric Administration.

ENVIRONMENTAL PROTECTION AGENCY (EPA)

Our national government today is not structured to make a coordinated attack on the pollutants which debase the air we breathe, the water we drink, and the land that grows our food. Indeed, the present governmental structure for dealing with environmental pollution often defies effective and concerted action.

Despite its complexity, for pollution control purposes the environment must be perceived as a single, interrelated system. Present assignments of departmental responsibilities do not reflect this interrelatedness.

Many agency missions, for example, are designed primarily along media lines—air, water, and land. Yet the sources of air, water, and land pollution are interrelated and often interchangeable. A single source may pollute the air with smoke and chemicals, the land with solid wastes, and a river or lake with chemical and other wastes. Control of the air pollution may produce more solid wastes, which then pollute the land or water. Control of the water-polluting effluent may convert it into solid wastes, which must be disposed of on land.

Similarly, some pollutants—chemicals, radiation, pesticides—appear in all media. Successful control of them at

present requires the coordinated efforts of a variety of separate agencies and departments. The results are not always successful.

A far more effective approach to pollution control would:

—Identify pollutants.

—Trace them through the entire ecological chain, observing and recording changes in form as they occur.
—Determine the total exposure of man and his environment.
—Examine interactions among forms of pollution.
—Identify where in the ecological chain interdiction would be most appropriate.

In organizational terms, this requires pulling together into one agency a variety of research, monitoring, standard-setting and enforcement activities now scattered through several departments and agencies. It also requires that the new agency include sufficient support elements—in research and in aids to State and local anti-pollution programs, for example—to give it the needed strength and potential for carrying out its mission. The new agency would also, of course, draw upon the results of research conducted by other agencies.

COMPONENTS OF THE EPA

Under the terms of Reorganization Plan No. 3, the following would be moved to the new Environmental Protection Agency:

—The functions carried out by the Federal Water Quality Administration (from the Department of the Interior).
—Functions with respect to pesticides studies now vested in the Department of the Interior.
—The functions carried out by the National Air Pollution Control Administration (from the Department of Health, Education, and Welfare).
—The functions carried out by the Bureau of Solid Waste Management and the Bureau of Water Hygiene, and portions of the functions carried out by the Bureau

of Radiological Health of the Environmental Control Administration (from the Department of Health, Education, and Welfare).

—Certain functions with respect to pesticides carried out by the Food and Drug Administration (from the Department of Health, Education, and Welfare).

—Authority to perform studies relating to ecological system now vested in the Council on Environmental Quality.

—Certain functions respecting radiation criteria and standards now vested in the Atomic Energy Commission and the Federal Radiation Council.

—Functions respecting pesticides registration and related activities now carried out by the Agricultural Research Service (from the Department of Agriculture).

With its broad mandate, EPA would also develop competence in areas of environmental protection that have not previously been given enough attention, such, for example, as the problem of noise, and it would provide an organization to which new programs in these areas could be added.

In brief, these are the principal functions to be transferred:

Federal Water Quality Administration.—Charged with the control of pollutants which impair water quality, it is broadly concerned with the impact of degraded water quality. It performs a wide variety of functions, including research, standard-setting and enforcement, and provides construction grants and technical assistance.

Certain pesticides research authority from the Department of the Interior.—Authority for research on the effects of pesticides on fish and wildlife would be provided to the EPA through transfer of the specialized research authority of the pesticides act enacted in 1958. Interior would retain its responsibility to do research on all factors affecting fish and wildlife. Under this provision, only one laboratory would be transferred to the EPA—the Gulf Breeze Biological Laboratory of the Bureau of Commercial Fisheries. The EPA would work closely with the fish and

wildlife laboratories remaining with the Bureau of Sport Fisheries and Wildlife.

National Air Pollution Control Administration.—As the principal Federal agency concerned with air pollution, it conducts research on the effects of air pollution, operates a monitoring network, and promulgates criteria which serve as the basis for setting air quality standards. Its regulatory functions are similar to those of the Federal Water Quality Administration. NAPCA is responsible for administering the Clean Air Act, which involves designating air quality regions, approving State standards, and providing financial and technical assistance to State Control agencies to enable them to comply with the Act's provisions. It also sets and enforces Federal automotive emission standards.

Elements of the Environmental Control Administration.—ECA is the focal point within HEW for evaluation and control of a broad range of environmental health problems, including water quality, solid wastes, and radiation. Programs in the ECA involve research, development of criteria and standards, and the administration of planning and demonstration grants. From the ECA, the activities of the Bureaus of Water Hygiene and Solid Waste Management and portions of the activities of the Bureau of Radiological Health would be transferred. Other functions of the ECA including those related to the regulation of radiation from consumer products and occupational safety and health would remain in HEW.

Pesticides research and standard-setting programs of the Food and Drug Administration.—FDA's pesticides program consists of setting and enforcing standards which limit pesticide residues in food. EPA would have the authority to set pesticide standards and to monitor compliance with them, as well as to conduct related research. However, as an integral part of its food protection activities, FDA, would retain its authority to remove from the market food with excess pesticide residues.

General ecological research from the Council on Environmental Quality.—This authority to perform studies and research relating to ecological systems would be in addition to EPA's other specific research authorities, and it would help EPA to measure the impact of pollutants. The Council

on Environmental Quality would retain its authority to conduct studies and research relating to environmental quality.

Environmental radiation standards programs.—The Atomic Energy Commission is now responsible for establishing environmental radiation standards and emission limits for radioactivity. Those standards have been based largely on broad guidelines recommended by the Federal Radiation Council. The Atomic Energy Commission's authority to set standards for the protection of the general environment from radioactive material would be transferred to the Environmental Protection Agency. The functions of the Federal Radiation Council would also be transferred. AEC would retain responsibility for the implementation and enforcement of radiation standards through its licensing authority.

Pesticides registration program of the Agricultural Research Service.—The Department of Agriculture is currently responsible for several distinct functions related to pesticides use. It conducts research on the efficacy of various pesticides as related to other pest control methods and on the effects of pesticides on non-target plants, livestock, and poultry. It registers pesticides, monitors their persistence and carries out an educational program on pesticide use through the extension service. It conducts extensive pest control programs which utilize pesticides.

By transferring the Department of Agriculture's pesticides registration and monitoring function to the EPA and merging it with the pesticides programs being transferred from HEW and Interior, the new agency would be given a broad capability for control over the introduction of pesticides into the environment.

The Department of Agriculture would continue to conduct research on the effectiveness of pesticides. The Department would furnish this information to the EPA, which would have the responsibility for actually licensing pesticides for use after considering environmental and health effects. Thus the new agency would be able to make use of the expertise of the Department.

ADVANTAGES OF REORGANIZATION

This reorganization would permit response to environmental problems in a manner beyond the previous capability of our pollution control programs. The EPA would have the capacity to do research on important pollutants irrespective of the media in which they appear, and on the impact of these pollutants on the total environment. Both by itself and together with other agencies, the EPA would monitor the condition of the environment—biological as well as physical. With these data, the EPA would be able to establish quantitative "environmental baselines"—critical if we are to measure adequately the success or failure of our pollution abatement efforts.

As no disjointed array of separate programs can, the EPA would be able—in concert with the States—to set and enforce standards for air and water quality and for individual pollutants. This consolidation of pollution control authorities would help assure that we do not create new environmental problems in the process of controlling existing ones. Industries seeking to minimize the adverse impact of their activities on the environment would be assured of consistent standards covering the full range of their waste disposal problems. As the States develop and expand their own pollution control programs, they would be able to look to one agency to support their efforts with financial and technical assistance and training.

In proposing that the Environmental Protection Agency be set up as a separate new agency, I am making an exception to one of my own principles: that, as a matter of effective and orderly administration, additional new independent agencies normally should not be created. In this case, however, the arguments against placing environmental protection activities under the jurisdiction of one or another of the existing departments and agencies are compelling.

In the first place, almost every part of government is concerned with the environment in some way, and affects it in some way. Yet each department also has its own primary mission—such as resource development, transportation, health, defense, urban growth or agriculture—which

necessarily affects its own view of environmental questions.

In the second place, if the critical standard-setting functions were centralized within any one existing department, it would require that department constantly to make decisions affecting other departments—in which, whether fairly or unfairly, its own objectivity as an impartial arbiter could be called into question.

Because environmental protection cuts across so many jurisdictions, and because arresting environmental deterioration is of great importance to the quality of life in our country and the world, I believe that in this case a strong, independent agency is needed. That agency would, of course, work closely with and draw upon the expertise and assistance of other agencies having experience in the environmental area.

ROLES AND FUNCTIONS OF EPA

The principal roles and functions of the EPA would include:

- —The establishment and enforcement of environmental protection standards consistent with national environmental goals.
- —The conduct of research on the adverse effects of pollution and on methods and equipment for controlling it, the gathering of information on pollution, and the use of this information in strengthening environmental protection programs and recommending policy changes.
- —Assisting others, through grants, technical assistance and other means in arresting pollution of the environment.
- —Assisting the Council on Environmental Quality in developing and recommending to the President new policies for the protection of the environment.

One natural question concerns the relationship between the EPA and the Council on Environmental Quality, recently established by Act of Congress.

It is my intention and expectation that the two will work in close harmony, reinforcing each other's mission. Essen-

tially, the Council is a top-level advisory group (which might be compared with the Council of Economic Advisers), while the EPA would be an operating, "line" organization. The Council will continue to be a part of the Executive Office of the President and will perform its overall coordinating and advisory roles with respect to all Federal programs related to environmental quality.

The Council, then, is concerned with all aspects of environmental quality—wildlife preservation, parklands, land use, and population growth, as well as pollution. The EPA would be charged with protecting the environment by abating pollution. In short, the Council focuses on what our broad policies in the environmental field should be; the EPA would focus on setting and enforcing pollution control standards. The two are not competing, but complementary—and taken together, they should give us, for the first time, the means to mount an effectively coordinated campaign against environmental degradation in all of its many forms.

* * * * *

RICHARD NIXON.

THE WHITE HOUSE, July 9, 1970.

UNITED STATES CODE

TITLE 42. -- THE PUBLIC HEALTH AND WELFARE

§ 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

(a) The term "agency of the United States" means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agency, committee, commission, office, or other establishment in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission, or other establishment in the judicial branch.

(b) The term "agreement for cooperation" means any agreement with another nation or regional defense organization authorized or permitted by sections 2074, 2077, 2094, 2112, 2121(c), 2133, 2134, or 2164 of this title, and made pursuant to section 2153 of this title.

(c) The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

(d) The term "atomic weapon" means any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device), the principal purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device.

(e) The term "byproduct material" means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

(f) The term "Commission" means the Atomic Energy Commission.

(g) The term "common defense and security" means the common defense and security of the United States.

* * * * *

§ 2022. Health and environmental standards for uranium mill tailings

(a) Promulgation and revision of rules for protection from hazards at inactive or depository sites

As soon as practicable, but not later than October 1, 1982, the Administrator of the Environmental Protection Agency (hereinafter referred to in this section as the "Administrator") shall, by rule, promulgate standards of general application (including standards applicable to licenses under section 104(h) of the Uranium Mill Tailings Radiation Control Act of 1978 [42 U.S.C. 7914(h)]) for the protection of the public health, safety, and the environment from radiological and nonradiological hazards associated with residual radioactive materials (as defined in section 101 of the Uranium Mill Tailings Radiation Control Act of 1978 [42 U.S.C. 7911]) located at inactive uranium mill tailings sites and depository sites for such materials selected by the Secretary of Energy, pursuant to title I of the Uranium Mill Tailings Radiation Control Act of 1978 [42 U.S.C. 7911 et seq.]. Standards promulgated pursuant to this subsection shall, to the maximum extent practicable, be consistent with the requirements of the Solid Waste Disposal Act, as amended [42 U.S.C. 6901 et seq.]. In establishing such standards, the Administrator shall consider the risk to the public health, safety, and the environment, the environmental and economic costs of applying such standards, and such other factors as the Administrator determines to be appropriate. The Administrator may periodically revise any standard promulgated pursuant to this subsection. After October 1, 1982, if the Administrator has not promulgated standards in final form under this

subsection, any action of the Secretary of Energy under title I of the Uranium Mill Tailings Radiation Control Act of 1978 which is required to comply with, or be taken in accordance with, standards of the Administrator shall comply with, or be taken in accordance with, the standards proposed by the Administrator under this subsection until such time as the Administrator promulgates such standards in final form.

(b) Promulgation and revision of rules for protection from hazards at processing or disposal sites

(1) As soon as practicable, but not later than October 31, 1982, the Administrator shall, by rule, propose, and within 11 months thereafter promulgate in final form, standards of general application for the protection of the public health, safety, and the environment from radiological and nonradiological hazards associated with the processing and with the possession, transfer, and disposal of byproduct material, as defined in section 2014(e)(2) of this title, at sites at which ores are processed primarily for their source material content or which are used for the disposal of such byproduct material. If the Administrator fails to promulgate standards in final form under this subsection by October 1, 1983, the authority of the Administrator to promulgate such standards shall terminate, and the Commission may take actions under this chapter without regard to any provision of this chapter requiring such actions to comply with, or be taken in accordance with, standards promulgated by the Administrator. In any such case, the Commission shall promulgate, and from time to time revise, any such standards of general application which the Commission deems necessary to carry out its responsibilities in the conduct of its licensing activities under this chapter. Requirements established by the Commission under this chapter with respect to byproduct material as defined in section 2014(e)(2) of this title shall conform to such standards. Any requirements adopted by the Commission respecting such byproduct material before promulgation by the Commission of such

standards shall be amended as the Commission deems necessary to conform to such standards in the same manner as provided in subsection (f)(3) of this section. Nothing in this subsection shall be construed to prohibit or suspend the implementation or enforcement by the Commission of any requirement of the Commission respecting byproduct material as defined in section 2014(e)(2) of this title pending promulgation by the Commission of any such standard of general application. In establishing such standards, the Administrator shall consider the risk to the public health, safety, and the environment, the environmental and economic costs of applying such standards, and such other factors as the Administrator determines to be appropriate.

(2) Such generally applicable standards promulgated pursuant to this subsection for nonradiological hazards shall provide for the protection of human health and the environment consistent with the standards required under subtitle C of the Solid Waste Disposal Act, as amended [42 U.S.C. 6921 et seq.], which are applicable to such hazards: *Provided, however,* That no permit issued by the Administrator is required under this chapter or the Solid Waste Disposal Act, as amended [42 U.S.C. 6901 et seq.], for the processing, possession, transfer, or disposal of byproduct material, as defined in section 2014(e)(2) of this title. The Administrator may periodically revise any standard promulgated pursuant to this subsection. Within three years after such revision of any such standard, the Commission and any State permitted to exercise authority under section 2021(b)(2) of this title shall apply such revised standard in the case of any license for byproduct material as defined in section 2014(e)(2) of this title or any revision thereof.

(c) Publication in Federal Register; notice and hearing; consultations; judicial review; time for petition; venue; copy to Administrator; record; administrative jurisdiction; review by Supreme Court; effective date of rule

(1) Before the promulgation of any rule pursuant to this section, the Administrator shall publish the proposed rule

in the Federal Register, together with a statement of the research, analysis, and other available information in support of such proposed rule, and provide a period of public comment of at least thirty days for written comments thereon and an opportunity, after such comment period and after public notice, for any interested person to present oral data, views, and arguments at a public hearing. There shall be a transcript of any such hearing. The Administrator shall consult with the Commission and the Secretary of Energy before promulgation of any such rule.

(2) Judicial review of any rule promulgated under this section may be obtained by any interested person only upon such person filing a petition for review within sixty days after such promulgation in the United States court of appeals for the Federal judicial circuit in which such person resides or has his principal place of business. A copy of the petition shall be forthwith transmitted by the clerk of court to the Administrator. The Administrator thereupon shall file in the court the written submissions to, and transcript of, the written or oral proceedings on which such rule was based as provided in section 2112 of title 28. The court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5 and to grant appropriate relief as provided in such chapter. The judgment of the court affirming, modifying, or setting aside, in whole or in part, any such rule shall be final, subject to judicial review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(3) Any rule promulgated under this section shall not take effect earlier than sixty calendar days after such promulgation.

(d) Federal and State implementation and enforcement

Implementation and enforcement of the standards promulgated pursuant to subsection (b) of this section shall be the responsibility of the Commission in the conduct of its licensing activities under this chapter. States exercising

authority pursuant to section 2021(b)(2) of this title shall implement and enforce such standards in accordance with subsection (o) of such section.

(e) Other authorities of Administrator unaffected

Nothing in this chapter applicable to byproduct material, as defined in section 2014(e)(2) of this title, shall affect the authority of the Administrator under the Clean Air Act of 1970, as amended [42 U.S.C. 7401 et seq.], or the Federal Water Pollution Control Act, as amended [33 U.S.C. 1251 et seq.].

(f) Implementation or enforcement of Uranium Mill Licensing Requirements

(1) Prior to January 1, 1983, the Commission shall not implement or enforce the provisions of the Uranium Mill Licensing Requirements published as final rules at 45 Federal Register 65521 to 65538 on October 3, 1980 (hereinafter in this subsection referred to as the "October 3 regulations"). After December 31, 1982, the Commission is authorized to implement and enforce the provisions of such October 3 regulations (and any subsequent modifications or additions to such regulations which may be adopted by the Commission), except as otherwise provided in paragraphs (2) and (3) of this subsection.

(2) Following the proposal by the Administrator of standards under subsection (b) of this section, the Commission shall review the October 3 regulations, and, not later than 90 days after the date of such proposal, suspend implementation and enforcement of any provision of such regulations which the Commission determines after notice and opportunity for public comment to require a major action or major commitment by licensees which would be unnecessary if --

(A) the standards proposed by the Administrator are promulgated in final form without modification, and

(B) the Commission's requirements are modified to conform to such standards.

Such suspension shall terminate on the earlier of April 1, 1984 or the date on which the Commission amends the October 3 regulations to conform to final standards promulgated by the Administrator under subsection (b) of this section. During the period of such suspension, the Commission shall continue to regulate byproduct material (as defined in section 2014(e)(2) of this title) under this chapter on a licensee-by-licensee basis as the Commission deems necessary to protect public health, safety, and the environment.

(3) Not later than 6 months after the date on which the Administrator promulgates final standards pursuant to subsection (b) of this section, the Commission shall, after notice and opportunity for public comment, amend the October 3 regulations, and adopt such modifications, as the Commission deems necessary to conform to such final standards of the Administrator.

(4) Nothing in this subsection may be construed as affecting the authority or responsibility of the Commission under section 2114 of this title to promulgate regulations to protect the public health and safety and the environment.

§ 2111. Domestic distribution; license; price limitations

No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any byproduct material, except to the extent authorized by this section, section 2112 or section 2114 of this title. The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed. The Commission may distribute, sell, loan, or lease such byproduct material as it owns to qualified applicants with or without charge: *Provided, however*, That, for byproduct material to be distributed by the Commission for a charge, the Commission shall establish prices on such

equitable basis as, in the opinion of the Commission, (a) will provide reasonable compensation to the Government for such material, (b) will not discourage the use of such material or the development of sources of supply of such material independent of the Commission, and (c) will encourage research and development. In distributing such material, the Commission shall give preference to applicants proposing to use such material either in the conduct of research and development or in medical therapy. The Commission shall not permit the distribution of any byproduct material to any licensee, and shall recall or order the recall of any distributed material from any licensee, who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission or who uses such material in violation of law or regulation of the Commission or in a manner other than as disclosed in the application therefor or approved by the Commission. The Commission is authorized to establish classes of byproduct material and to exempt certain classes or quantities of material or kinds of uses or users from the requirements for a license set forth in this section when it makes a finding that the exemption of such classes or quantities of such material or such kinds of uses or users will not constitute an unreasonable risk to the common defense and security and to the health and safety of the public.

§ 2113. Ownership and custody of certain byproduct material and disposal sites

(a) Specific assurances in license for pretermination actions

Any license issued or renewed after the effective date of this section under section 2092 or section 2111 of this title for any activity which results in the production of any byproduct material, as defined in section 2014(e)(2) of this title, shall contain such terms and conditions as the Commission determines to be necessary to assure that, prior to termination of such license --

(1) the licensee will comply with decontamination, decommissioning, and reclamation standards prescribed by

the Commission for sites (A) at which ores were processed primarily for their source material content and (B) at which such byproduct material is deposited, and

(2) ownership of any byproduct material, as defined in section 2014(e)(2) of this title, which resulted from such licensed activity shall be transferred to (A) the United States or (B) in the State in which such activity occurred if such State exercises the option under subsection (b)(1) of this section to acquire land used for the disposal of byproduct material.

Any license which is in effect on the effective date of this section and which is subsequently terminated without renewal shall comply with paragraphs (1) and (2) upon termination.

(b) Transfer of title; health and environmental protection through maintenance of property and materials; use of surface or subsurface estates: first refusal rights of transferor; maintenance, monitoring, and emergency measures and other authorized action; licensee-transferor liability for fraud or negligence; administrative and legal costs limitation; government retransfers under section 7914(h) of this title

(1)(A) The Commission shall require by rule, regulation, or order that prior to the termination of any license which is issued after the effective date of this section, title to the land, including any interests therein (other than land owned by the United States or by a State) which is used for the disposal of any byproduct material, as defined by section 2014(e)(2) of this title, pursuant to such license shall be transferred to --

(i) the United States, or

(ii) the State in which such land is located, at the option of such State,

unless the Commission determines prior to such termination that transfer of title to such land and such by-

product material is not necessary or desirable to protect the public health, safety, or welfare or to minimize or eliminate danger to life or property. Such determination shall be made in accordance with section 2231 of this title. Notwithstanding any other provision of law or any such determination, such property and materials shall be maintained pursuant to a license issued by the Commission pursuant to section 2111 of this title in such manner as will protect the public health, safety, and the environment.

(B) If the Commission determines by order that use of the surface or subsurface estates, or both, of the land transferred to the United States or to a State under subparagraph (A) would not endanger the public health, safety, welfare, or environment, the Commission, pursuant to such regulations as it may prescribe, shall permit the use of the surface or subsurface estates, or both, of such land in a manner consistent with the provisions of this section. If the Commission permits such use of such land, it shall provide the person who transferred such land with the right of first refusal with respect to such use of such land.

(2) If transfer to the United States of title to such byproduct material and such land is required under this section, the Secretary of Energy or any Federal agency designated by the President shall, following the Commission's determination of compliance under subsection (c) of this section, assume title and custody of such byproduct material and land transferred as provided in this subsection. Such Secretary or Federal agency shall maintain such material and land in such manner as will protect the public health and safety and the environment. Such custody may be transferred to another officer or instrumentality of the United States only upon approval of the President.

(3) If transfer to a State of title to such byproduct material is required in accordance with this subsection, such State shall, following the Commission's determination of compliance under subsection (d) of this section, assume title and custody of such byproduct material and land transferred as provided in this subsection. Such State shall

maintain such material and land in such manner as will protect the public health, safety, and the environment.

(4) In the case of any such license under section 2092 of this title, which was in effect on the effective date of this section, the Commission may require, before the termination of such license, such transfer of land and interests therein (as described in paragraph (1) of this subsection) to the United States or a State in which such land is located, at the option of such State, as may be necessary to protect the public health, welfare, and the environment from any effects associated with such byproduct material. In exercising the authority of this paragraph, the Commission shall take into consideration the status of the ownership of such land and interests therein and the ability of the licensee to transfer title and custody thereof to the United States or a State.

(5) The Commission may, pursuant to a license, or by rule or order, require the Secretary or other Federal agency or State having custody of such property and materials to undertake such monitoring, maintenance, and emergency measures as are necessary to protect the public health and safety and such other actions as the Commission deems necessary to comply with the standards promulgated pursuant to section 2114 of this title. The Secretary or such other Federal agency is authorized to carry out maintenance, monitoring, and emergency measures, but shall take no other action pursuant to such license, rule or order, with respect to such property and materials unless expressly authorized by Congress after November 8, 1978.

(6) The transfer of title to land or byproduct materials, as defined in section 2014(e)(2) of this title, to a State or the United States pursuant to this subsection shall not relieve any licensee of liability for any fraudulent or negligent acts done prior to such transfer.

(7) Material and land transferred to the United States or a State in accordance with this subsection shall be transferred without cost to the United States or a State

(other than administrative and legal costs incurred in carrying out such transfer). Subject to the provisions of paragraph (1)(B) of this subsection, the United States or a State shall not transfer title to material or property acquired under this subsection to any person, unless such transfer is in the same manner as provided under section 7914(h) of this title.

(8) The provisions of this subsection respecting transfer of title and custody to land shall not apply in the case of lands held in trust by the United States for any Indian tribe or lands owned by such Indian tribe subject to a restriction against alienation imposed by the United States. In the case of such lands which are used for the disposal of byproduct material, as defined in section 2014(e)(2) of this title, the licensee shall be required to enter into such arrangements with the Commission as may be appropriate to assure the long-term maintenance and monitoring of such lands by the United States.

(c) Compliance with applicable standards and license requirements; determination upon termination of license

Upon termination on[1] any license to which this section applies, the Commission shall determine whether or not the licensee has complied with all applicable standards and requirements under such license.

§ 2114. Authorities of Commission respecting certain byproduct material

(a) Management function

The Commission shall insure that the management of any byproduct material, as defined in section 2014(e)(2) of this title, is carried out in such manner as --

(1) the Commission deems appropriate to protect the public health and safety and the environment from radiological and nonradiological hazards associated with the processing and with the possession and transfer of such

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[1] So in original. Probably should be "of".

material, taking into account the risk to the public health, safety, and the environment, with due consideration of the economic costs and such other factors as the Commission determines to be appropriate,

(2) conforms with applicable general standards promulgated by the Administrator of the Environmental Protection Agency under section 2022 of this title, and

(3) conforms to general requirements established by the Commission, with the concurrence of the Administrator, which are, to the maximum extent practicable, at least comparable to requirements applicable to the possession, transfer, and disposal of similar hazardous material regulated by the Administrator under the Solid Waste Disposal Act, as amended [42 U.S.C. 6901 et seq.].

(b) Rules, regulations, or orders for certain activities; civil penalty

In carrying out its authority under this section, the Commission is authorized to --

(1) by rule, regulation, or order require persons, officers, or instrumentalities exempted from licensing under section 2111 of this title to conduct monitoring, perform remedial work, and to comply with such other measures as it may deem necessary or desirable to protect health or to minimize danger to life or property, and in connection with the disposal or storage of such byproduct material; and

(2) make such studies and inspections and to conduct such monitoring as may be necessary.

Any violation by any person other than the United States or any officer or employee of the United States or a State of any rule, regulation, or order or licensing provision, of the Commission established under this section or section 2113 of this title shall be subject to a civil penalty in the same manner and in the same amount as violations subject to a civil penalty under section 2282 of this title. Nothing in this section affects any authority of the Commission under any other provision of this chapter.

(c) Alternative requirements or proposals

In the case of sites at which ores are processed primarily for their source material content or which are used for the disposal of byproduct material as defined in section 2014 (e) (2) of this title, a licensee may propose alternatives to specific requirements adopted and enforced by the Commission under this chapter. Such alternative proposals may take into account local or regional conditions, including geology, topography, hydrology and meteorology. The Commission may treat such alternatives as satisfying Commission requirements if the Commission determines that such alternatives will achieve a level of stabilization and containment of the sites concerned, and a level of protection for public health, safety, and the environment from radiological and nonradiological hazards associated with such sites, which is equivalent to, to the extent practicable, or more stringent than the level which would be achieved by standards and requirements adopted and enforced by the Commission for the same purpose and any final standards promulgated by the Administrator of the Environmental Protection Agency in accordance with section 2022 of this title.

§ 2201 General duties of Commission

In the performance of its functions the Commission is authorized to --

* * * * *

(b) Standards governing use and possession of material

establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property;

* * * * *

(x) Standards and instructions for bonding, surety, or other financial arrangements, including performance bonds

Establish by rule, regulation, or order, after public notice, and in accordance with the requirements of section 2231 of this title, such standards and instructions as the Commission may deem necessary or desirable to ensure --

(1) that an adequate bond, surety, or other financial arrangement (as determined by the Commission) will be provided, before termination of any license for byproduct material as defined in section 2014(e)(2) of this title, by a licensee to permit the completion of all requirements established by the Commission for the decontamination, decommissioning, and reclamation of sites, structures, and equipment used in conjunction with byproduct material as so defined, and

(2) that --

(A) in the case of any such license issued or renewed after November 8, 1978, the need for long-term maintenance and monitoring of such sites, structures and equipment after termination of such license will be minimized and, to the maximum extent practicable, eliminated; and

(B) in the case of each license for such material (whether in effect on November 8, 1978, or issued or renewed thereafter), if the Commission determines that any such long-term maintenance and monitoring is necessary, the licensee, before termination of any license for byproduct material as defined in section 2014(e)(2) of this title, will make available such bonding, surety, or other financial arrangements as may be necessary to assure such long-term maintenance and monitoring. Such standards and instructions promulgated by the Commission pursuant to this subsection shall take into account, as determined by the Commission, so as to avoid unnecessary duplication and expense, performance bonds or other financial arrangements which are required by other Federal agencies or

State agencies and/or other local governing bodies for such decommissioning, decontamination, and reclamation and long-term maintenance and monitoring except that nothing in this paragraph shall be construed to require that the Commission accept such bonds or arrangements if the Commission determines that such bonds or arrangements are not adequate to carry out subparagraphs (1) and (2) of this subsection.

* * * * *

§ 7901. Congressional findings and purposes

(a) The Congress finds that uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public, and that the protection of the public health, safety, and welfare and the regulation of interstate commerce require that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of such tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings.

(b) **The purposes of this chapter are to provide --**

(1) in cooperation with the interested States, Indian tribes, and the persons who own or control inactive mill tailings sites, a program of assessment and remedial action at such sites, including, where appropriate, the reprocessing of tailings to extract residual uranium and other mineral values where practicable, in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public, and

(2) a program to regulate mill tailings during uranium or thorium ore processing at active mill operations and after termination of such operations in order to stabilize and control such tailings in a safe and environmentally

sound manner and to minimize or eliminate radiation health hazards to the public.

§ 7911. Definitions

For purposes of this subchapter --

(1) The term "Secretary" means the Secretary of Energy.

(2) The term "Commission" means the Nuclear Regulatory Commission.

(3) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(4) The term "Indian tribe" means any tribe, band, clan, group, pueblo, or community of Indians recognized as eligible for services provided by the Secretary of the Interior to Indians.

(5) The term "person" means any individual, association, partnership, corporation, firm, joint venture, trust, government entity, and any other entity, except that such term does not include any Indian or Indian tribe.

(6) The term "processing site" means --

(A) any site, including the mill, containing residual radioactive materials at which all or substantially all of the uranium was produced for sale to any Federal agency prior to January 1, 1971 under a contract with any Federal agency, except in the case of a site at or near Slick Rock, Colorado, unless --

(i) such site was owned or controlled as of January 1, 1978, or is thereafter owned or controlled, by any Federal agency, or

(ii) a license (issued by the Commission or its predecessor agency under the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.] or by a State as permitted under section 274 of such Act [42 U.S.C. 2021]) for the production at such site of any uranium or thorium product

derived from ores is in effect on January 1, 1978, or is issued or renewed after such date; and

(B) any other real property or improvement thereon which --

(i) is in the vicinity of such site, and

(ii) is determined by the Secretary, in consultation with the Commission, to be contaminated with residual radioactive materials derived from such site.

Any ownership or control of an area by a Federal agency which is acquired pursuant to a cooperative agreement under this subchapter shall not be treated as ownership or control by such agency for purposes of subparagraph (A)(i). A license for the production of any uranium product from residual radioactive materials shall not be treated as a license for production from ores within the meaning of subparagraph (A)(ii) if such production is in accordance with section 7918 (b) of this title.

(7) The term "residual radioactive material" means --

(A) waste (which the Secretary determines to be radioactive) in the form of tailings resulting from the processing of ores for the extraction of uranium and other valuable constituents of the ores; and

(B) other waste (which the Secretary determines to be radioactive) at a processing site which relate to such processing, including any residual stock of unprocessed ores or lowgrade materials.

(8) The term "tailings" means the remaining portion of a metal-bearing ore after some or all of such metal, such as uranium, has been extracted.

(9) The term "Federal agency" includes any executive agency as defined in section 105 of title 5.

(10) The term "United States" means the 48 contiguous States and Alaska, Hawaii, Puerto Rico, the District of Columbia, and the territories and possessions of the United States.

§ 7912. Processing site designations

(a) Specific and other site locations; remedial action; consultations; boundaries; Grand Junction, Colorado site restriction

(1) As soon as practicable, but no later than one year after November 8, 1978, the Secretary shall designate processing sites at or near the following locations:

Salt Lake City, Utah
Green River, Utah
Mexican Hat, Utah
Durango, Colorado
Grand Junction, Colorado
Rifle, Colorado (two sites)
Gunnison, Colorado
Naturita, Colorado
Maybell, Colorado
Slick Rock, Colorado (two sites)
Shiprock, New Mexico
Ambrosia Lake, New Mexico
Riverton, Wyoming
Converse County, Wyoming
Lakeview, Oregon
Falls City, Texas
Tuba City, Arizona
Monument Valley, Arizona
Lowman, Idaho
Cannonsburg, Pennsylvania

Subject to the provisions of this subchapter, the Secretary shall complete remedial action at the above listed sites before his authority terminates under this subchapter. The Secretary shall within one year of November 8, 1978, also designate all other processing sites within the United States which he determines requires remedial action to carry out the purposes of this subchapter. In making such designation, the Secretary shall consult with the Administrator, the Commission, and the affected States, and in the case of Indian lands, the appropriate Indian tribe and the Secretary of the Interior.

(2) As part of his designation under this subsection, the Secretary, in consultation with the Commission, shall determine the boundaries of each such site.

(3) No site or structure with respect to which remedial action is authorized under Public Law 92-314 in Grand Junction, Colorado, may be designated by the Secretary as a processing site under this section.

(b) Health hazard assessment; priorities for remedial action

Within one year from November 8, 1978, the Secretary shall assess the potential health hazard to the public from the residual radioactive materials at designated processing sites. Based upon such assessment, the Secretary shall, within such one year period, establish priorities for carrying out remedial action at each such site. In establishing such priorities, the Secretary shall rely primarily on the advice of the Administrator.

* * * * *

§ 7913. State cooperative agreements

(a) Authority of Secretary; prompt commencement of preparations

After notifying a State of the designation referred to in section 7912 of this title, the Secretary subject to section 7923 of this title, is authorized to enter into cooperative agreements with such State to perform remedial actions at each designated processing site in such State (other than a site located on Indian lands referred to in section 7915 of this title). The Secretary shall, to the greatest extent practicable, enter into such agreements and carry out such remedial actions in accordance with the priorities established by him under section 7912 of this title. The Secretary shall commence preparations for cooperative agreements with respect to each designated processing site as promptly as practicable following the designation of each site.

(b) Terms and conditions; limitation of Federal assistance

Each cooperative agreement under this section shall contain such terms and conditions as the Secretary deems appropriate and consistent with the purposes of this chapter, including, but not limited to, a limitation on the use of Federal assistance to those costs which are directly required to complete the remedial action selected pursuant to section 7918 of this title.

* * * * *

§ 7914. Acquisition and Disposition of Lands and Materials

(a) State acquisition; windfall profits prevention

Each cooperative agreement under section 7913 of this title shall require the State, where determined appropriate by the Secretary with the concurrence of the Commission, to acquire any designated processing site, including where appropriate any interest therein. In determining whether to require the State to acquire a designated processing site or interest therein, consideration shall be given to the prevention of windfall profits.

(b) Disposition and stabilization site for residual radioactive materials; Federal site available

(1) If the Secretary with the concurrence of the Commission determines that removal of residual radioactive material from a processing site is appropriate, the cooperative agreement shall provide that the State shall acquire land (including, where appropriate, any interest therein) to be used as a site for the permanent disposition and stabilization of such residual radioactive materials in a safe and environmentally sound manner.

(2) Acquisition by the State shall not be required under this subsection if a site located on land controlled by the Secretary or made available by the Secretary of the Interior pursuant to section 7916(2) of this title is designated by the Secretary, with the concurrence of the Commission, for such disposition and stabilization.

* * * * *

§ 7918. Remedial action and mineral recovery activities

(a) General standards for remedial action; Federal performance and state participation; use of technology; promulgation of standards

(1) The Secretary or such person as he may designate shall select and perform remedial actions at designated processing sites and disposal sites in accordance with the general standards prescribed by the Administrator pursuant to section 275 a. of the Atomic Energy Act of 1954 [42 U.S.C. 2022(a)]. The State shall participate fully in the selection and performance of a remedial action for which it pays part of the cost. Such remedial action shall be selected and performed with the concurrence of the Commission and in consultation, as appropriate, with the Indian tribe and the Secretary of the Interior.

(2) The Secretary shall use technology in performing such remedial action as will insure compliance with the general standards promulgated by the Administrator under section 275 a. of the Atomic Energy Act of 1954 [42 U.S.C. 2022(a)] and will assure the safe and environmentally sound stabilization of residual radioactive materials, consistent with existing law.

(3) Notwithstanding paragraphs (1) and (2) of this subsection, after October 31, 1982, if the Administrator has not promulgated standards under section 275 a. of the Atomic Energy Act of 1954 [42 U.S.C. 2022(a)] in final form by such date, remedial action taken by the Secretary under this subchapter shall comply with the standards proposed by the Administrator under such section 275 a. until such time as the Administrator promulgates the standards in final form.

* * * * *

§ 7919. Rules

The Secretary may prescribe such rules consistent with the purposes of this chapter as he deems appropriate pursuant to title V of the Department of Energy Organization Act [42 U.S.C. 7191 et seq.].

* * * * *

§ 7924. Reports to Congress

(a) Information; consultations; separate official views; partial report concerning uranium mill tailings provisions

Beginning on January 1, 1980, and each year thereafter until January 1, 1986, the Secretary shall submit a report to the Congress with respect to the status of the actions required to be taken by the Secretary, the Commission, the Secretary of the Interior, the Administrator, and the States and Indian tribes under this chapter and any amendments to other laws made by this Act. Each report shall --

(1) include data on the actual and estimated costs of the program authorized by this subchapter;

(2) describe the extent of participation by the States and Indian tribes in this program;

(3) evaluate the effectiveness of remedial actions, and describe any problems associated with the performance of such actions; and

(4) contain such other information as may be appropriate. Such report shall be prepared in consultation with the Commission, the Secretary of the Interior, and the Administrator and shall contain their separate views, comments, and recommendations, if any. The Commission shall submit to the Secretary and Congress such portion of the report under this subsection as relates to the authorities of the Commission under title II of this Act.

(b) Identification of sites; Federal agency jurisdiction; contents; duplication prohibition; use and cooperation respecting other Federal agency information

Not later than July 1, 1979, the Secretary shall provide a report to the Congress which identifies all sites located on public or acquired lands of the United States containing residual radioactive materials and other radioactive waste (other than waste resulting from the production of electric energy) and specifies which Federal agency has jurisdiction over such sites. The report shall include the identity of property and other structures in the vicinity of such site that are contaminated or may be contaminated by such materials and the actions planned or taken to remove such materials. The report shall describe in what manner such sites are adequately stabilized and otherwise controlled to prevent radon diffusion from such sites into the environment and other environmental harm. If any site is not so stabilized or controlled, the report shall describe the remedial actions planned for such site and the time frame for performing such actions. In preparing the reports under this section, the Secretary shall avoid duplication of previous or ongoing studies and shall utilize all information available from other departments and agencies of the United States respecting the subject matter of such report. Such agencies shall cooperate with the Secretary in the preparation of such report and furnish such information as available to them and necessary for such report.

(c) Uranium mine wastes hazards elimination program

Not later than January 1, 1980, the Administrator, in consultation with the Commission, shall provide a report to the Congress which identifies the location and potential health, safety, and environmental hazards of uranium mine wastes together with recommendations, if any, for a program to eliminate these hazards.

* * * * *

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 16 1981

SUBJECT: Authority to Promulgate Generally Applicable Standards Pursuant to Uranium Mill Tailings Radiation Control Act

FROM: Robert M. Perry
General Counsel (A-130)

TO: Kathleen M. Bennett, Assistant Administrator Air, Noise and Radiation

MEMORANDUM OF LAW

QUESTION

Does EPA's obligation to promulgate generally applicable standards under the Uranium Mill Tailings Radiation Control Act of 1978, P.L. 95-604 include authority to establish work practice-type requirements.

ANSWER

EPA's authority to set generally applicable standards does not include authority to set work practice type requirements. Regulatory options which prescribe such requirements rather than prescribing some form of numerical limits of radiation levels might therefore be subject to judicial invalidation as exceeding EPA's authority.

DISCUSSION

My conclusion that EPA's authority to set UMTRCA standards is a limited authority is based on (i) the term "standard" as used in the statute and in the accompanying legislative history; (ii) the usage of the same term in re-

lated Atomic Energy Act authority; and (iii) the Supreme Court holding in *Adamo Wrecking Company* v. *U.S.*, 434 U.S. 275 (1978). These considerations are discussed in more detail below.

(i) The Uranium Mill Tailings Radiation Control Act

The plan of the Uranium Mill Tailings Radiation Control Act and its legislative history provide the primary basis for concluding that the authority to set generally applicable standards is a limited one and does not encompass authority to establish work practice requirements. The statutory plan is for EPA to set general levels of protection and for DOE to determine how to implement or achieve them.

The relevant provision of the Uranium Mill Tailings Radiation Control Act is its addition of Section 275 to the Atomic Energy Act. Section 275 provides, in relevant part, that the EPA Administrator "shall, by rule, promulgate standards of general applicability . . . for the protection of the public health, safety, and the environment from radiological and non-radiological hazards associated with residual radioactive materials . . . located at inactive uranium mill tailings sites . . ." Section 206, P.L. 95-604, 92 Stat. 3021, 42 U.S.C. 2022.

While EPA is to set such standards for inactive mill tailings sites, authority to implement the standards was given to the Department of Energy, to which was assigned responsibility to take remedial action at such sites, Section 101 et seq., 42 U.S.C. 7911.* Subsections 108(a)(1) and (2) provide, in relevant part, that the Secretary of Energy "shall select and perform remedial actions . . . in accordance with the general standards prescribed by the administrator pursuant to Section 275a of the Atomic Energy Act" and "shall use technology in performing such remedial action as will insure compliance with the general [EPA promulgated] standards".

The statutory plan, therefore, is for EPA to set general standards for radiation protection and for the DOE to de-

*This bifurcation of standard setting and implementing responsibilities between EPA and the agency with direct responsibility for the program was repeated in provisions dealing with active mill tailings sites, see Section 206(a) [Section 275 b and d].

termine how to implement or achieve those levels. Congress' intention in this respect is confirmed by the legislative history of the Act. H.R. Report 95-1480 states that

> The EPA standards should be developed to limit the exposure (or potential exposure) of the public and to protect the general environment from either radiological or non-radiological substances to acceptable levels through such means as allowable concentrations in air and water, quantities of the substances released over a period of time, or by specifying maximum allowable doses or levels to individuals in the general population. *The EPA standards or criteria should not interject any detailed or site-specific requirements for management, technology or engineering methods on licensees or on the DOE* p. 16-17. [Emphasis added]

The statute and legislative history indicate therefore that the standards which EPA is authorized to promulgate are general levels of protection. This does not include methods of protection, as to which DOE has discretionary authority.**

(ii) The Atomic Energy Act and Reorganization Plan No. 3

The UMTRCA language discussed above was modelled closely on comparable authority contained in the Atomic Energy Act as transferred to EPA in the Reorganization Plan No. 3 of 1970. The concept of generally applicable standards in UMTRCA should be understood, therefore, in the light of the same term as used in that Plan. Authority under Reorganization Plan No. 3 to establish generally applicable standards for high level radioactive waste is limited to an authority to set generally applicable standards an authority then describes as authority to set "limits on ra-

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**This memorandum is limited to UMTRCA. EPA-administered statutes do at times contain authority to do more than set general standards. Without analyzing each statute, it may be noted that the Safe Drinking Water Act contains explicit authority to set general "drinking water regulations" and, where it proves impractical to ascertain contaminant levels, to establish "treatment techniques".

diation exposure or levels, or concentrations or quantities of radioactive materials . . ." Section 2(b).***

(iii) The *Adamo* Case (*Adamo Wrecking Co.* v. *U.S.*, 434 U.S. 275, 98 S.Ct. 566 (1978)

The *Adamo* case provides an important precedent for understanding the scope of authority contained in an authority to set generally applicable standards. In *Adamo*, the Supreme Court held that EPA's authority under Section 12 of the Clean Air Act to set emission standards for hazardous air pollutants did not include authority to set work practice standards especially when, as in UMTRCA, Congress' term "standards" was linked with the concept of "levels" of protection. It held that a standard is a quantitative measure, which is distinct from (but may be achieved by) techniques, controls or technology. The Court's holding was anticipated and implicitly accepted by Congress in 1977 when in accordance with a lower court decision it amended Section 112 to define standards as including work practices. The *Adamo* holding is a precedent which EPA cannot ignore as it would be readily available to any petitioner in a proceeding challenging EPA's action in promulgating non-numerical work-practice-type standards in the UMTRCA context.

Finally, we note that the risk of a challenge on these grounds is high. Some industry groups view these standards as a precedent for the standard for active mills, and will therefore probably challenge the standards upon promulgation. In previous litigation, members of these groups have raised issues of EPA's authority under Reorganization Plan No. 3 of 1970. We must therefore assume that similar arguments would be made against our adoption of specific work practice or design requirements.

***See Memorandum from Jane Axelrad, Esq. to Daniel Egan dated May 20 1980 regarding OGC Comments on the High Level Waste Standard.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 15 1985

Honorable Samuel Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

ATTENTION: Docketing and Service Branch

Dear Mr. Chilk:

In accordance with Section 309 of the Clean Air Act, as amended, the U.S. Environmental Protection Agency has reviewed the proposed Uranium Mill Tailings Regulations; Conforming NRC Requirements to EPA Standards (49 FR 46418, November 26, 1984).

Section 84a(2) of the Atomic Energy Act, as amended (AEA), requires NRC to ensure that uranium and thorium byproduct materials (tailings) are managed in conformance with EPA's standards (40 CFR 192, Subparts D and E). NRC's notice proposed certain changes in its regulations because of this conformance requirement. However, NRC proposed to conform its regulations to only a portion of the EPA standard, reserving conformance to the remainder of the standard for a subsequent rulemaking. The reasons NRC cited for this deferral of conformance are not sufficient in our opinion. NRC's notice states that the standards became effective for NRC and Agreement State licensees and license applicants on December 6, 1983. In view of this fact and the non-discretionary nature of Section 84a(2), the NRC should promptly conform its regulations to the entire EPA standard for both uranium and thorium tailings, including the standards for nonradioactive

as well as radioactive materials. Doing so would not interfere with any subsequent NRC rulemakings necessary to comply with Section 84a(3) of the AEA, whose provisions relate to waste management requirements other than the standards EPA has issued for tailings. NRC's proposed course would unnecessarily delay a mandatory action and create confusion about the status and requirements of final standards. NRC's notice acknowledges that these have been effective for NRC and Agreement State licensees and applicants since December 1983.

Subject to the above comments on the scope of the rulemaking, we believe that a separate rulemaking is appropriate for complying with the separate requirements of Section 84a(3). EPA will provide comments on NRC's Advance Notice of Proposed Rulemaking (49 FR 46425, November 26, 1984) shortly.

NRC states that AEA Section 84c, enacted in 1982, confers authority to approve or employ "alternatives" to EPA standards, including, but not limited to, groundwater standards. NRC's statement is based on a misinterpretation of Section 84c. Section 84c does not confer on NRC authority to approve or employ alternative standards or to substitute its judgment for EPA's regarding the level of protection necessary to protect public health and the environment. Rather it authorizes NRC to approve or employ licensee-proposed alternatives to NRC's own general *implementing requirements* when such alternatives would provide the level of containment, stabilization, and protection of health and the environment provided by existing NRC requirements and EPA standards.

With respect to alternate concentration limits (ACLs) and delisting of hazardous constituents, EPA established, consistent with its standards under the Solid Waste Disposal Act, as amended, general mechanisms for alternate standards based on its judgment that such mechanisms could ensure equivalent protection of public health and the environment. NRC claims that EPA overreached, because, in its view, such mechanisms involve site-specific consid-

erations that NRC believes Section 84c placed within its exclusive purview. We disagree with NRC's interpretation of Section 84c and of the concurrence issue. The fact that EPA's standards (or any standards, for that matter) operate in a manner specific to sites do not render them subject to change or invalid under Section 84c. The general criteria involved in carrying out these mechanisms for alternate standards require health and environmental judgments. These judgments are clearly within EPA's purview. Moreover, such mechanisms were provided by the SWDA standards recognized in UMTRCA, and - as NRC is aware - EPA's concurrence requirement need not be exercised site-specifically.

More generally, in setting standards EPA exercised the independent judgment regarding practicability, which Congress required EPA and NRC to exercise within their respective standard-setting and implementation roles. Congress did not thereby vest NRC with jurisdiction to set, much less apply, alternative health and environmental protection standards. Section 84 merely authorizes alternate NRC requirements to be used at a site when doing so represents maximum practicable adherence to NRC requirements and when doing so would also attain EPA standards.

In a related area, we believe the authority to apply alternatives cannot be exercised in advance of establishing "specific requirements adopted and enforced by the Commission" under the AEA.

As a general matter, the proposed changes do not appear to reflect or implement the important distinction between new and existing wastes embodied in EPA's regulations or, in that connection, to the "existing portion" concept (40 CFR 192.31(j), 192.32(a)(1)). Relatedly, the term "site" is used at times to refer to milling sites, and at times to refer to places where disposal takes place. The two are not necessarily the same.

Criterion 5, change (a): While not objecting to the proposed change, we note that NRC's stated reason for the

change could confuse the public about the requirements of 40 CFR 192.32(a). NRC has described the standard as not permitting any seepage to groundwater. However, the standard requires only new disposal areas to be designed to prevent such seepage. The standard limits the groundwater concentration changes caused by any seepage that may actually occur from either new or existing portions of a tailings pile.

The NRC should also consider adding a footnote to this criterion, explaining that further changes or new requirements may result from the second rulemaking.

Criterion 5, change (d): Except with respect to "existing portions," the goal of isolation as a primary requirement is consistent with EPA standards and should therefore be retained.

Criterion 6, change (a): This change is not required to conform to EPA's standards, which do not address the thickness or composition of a cover. A minimum cover specification would be consistent with the goals of the standard. NRC originally adopted the thickness requirement both to achieve a certain level of radon emission control (then 2 pCi/m^{2}s) and to provide reasonable assurance of adequate long-term performance of the cover under erosional and other stresses, such as plant roots and burrowing animals (see NRC's FGEIS for Uranium Milling, NUREG-0706, Section 12.3.4.7). Providing reasonable assurance of conformance to the flux standard and its long-term maintenance are also important requirements for implementing the EPA standards (see 48 FR 45938, fifth paragraph). Therefore, we recommend NRC not delete the thickness requirement, but adopt appropriate minimum technical cover specifications based on the FGEIS and consistent with EPA's standard.

The proposed language relating to "material to be permanently disposed" suggests that some material is to be disposed impermanently or that some material may be indefinitely stored. More probably, NRC intends only to refer

to the commencement of the closure period. We suggest NRC clarify its intent.

Change 8: Criteria 2, 7, 9, 11 and 12 may be affected by SWDA requirements relating to the same subject matter. As EPA noted in its preamble Sections A (except Section 264.3), B, C, D, E, F, G, H and K of 40 CFR 264 *et seq.* are relevant to NRC's rulemaking by virtue of the provisions of Section 84(a)(3) of the Atomic Energy Act.

We will provide additional comments on the companion advanced notice of proposed rulemaking (49 FR 46425 *et seq.*) shortly. If you have any questions concerning EPA's comments, please contact Dr. W. Alexander Williams (382-5909) of my staff.

Sincerely,

ALAN HIRSCH
Director
Office of Federal Activities

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 8, 1985

Mr. Samuel Chilk
Secretary to the Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Chilk:

In accordance with Section 309 of the Clean Air Act and in keeping with our responsibilities under the Solid Waste Disposal Act (SWDA) and the Uranium Mill Tailings Radiation Control Act (of 1978) (UMTRCA) the U.S. Environmental Protection Agency (EPA) has reviewed the U.S. Nuclear Regulatory Commission's (NRC) Advanced Notice of Proposed Rulemaking for Uranium Mill Tailings Regulations; Groundwater Protection and Other Issues (10 CFR 40, 49 FR 46425). EPA previously commented on the companion NRC Proposed Rules for Uranium Mill Tailings Regulations; Conforming NRC Requirements to EPA Standards (49 FR 46418). A copy of the earlier comments is enclosed.

Many issues are common to both notices. Rather than repeating them here, we refer to our earlier comments, including, but not limited to, the discussions (page 1, paragraph 2) on the scope of NRC's rulemakings and (page 2, paragraphs 1, 2, 3, and 4) on NRC's statement of its authority and responsibility. As requested in the ANPR, we have commented on the two broad issues: physical stability and groundwater protection requirements and have also addressed the specific questions contained in the ANPR.

A. Physical Stability Requirements

The ANPR does not reflect the nature of EPA's physical stability requirements. As explained below, EPA's numer-

ical standard for longevity is expressed differently from, but not necessarily inconsistently with, the prescriptive elements of NRC's Appendix A requirements. Indeed, EPA relied on the same analytical work that NRC used when NRC sought to confirm the appropriateness of its own prescriptive provisions to assure physical stability of tailings piles. From NRC's own work ("Design Considerations for Long-Term Stabilization of Uranium Mill Tailings Impoundments," by J.D. Nelson, *et al.*, NUREG/CR-3397, October 1983), we concluded that there is little difference, if any, between a reasonable implementation of EPA's longevity standard (design to provide reasonable assurance of control . . . to be effective for 1000 years, to the extent reasonably achievable, and in any case for at least 200 years) and NRC's existing longevity rule (isolate tailings for thousands of years). The EPA included a presentation in its FEIS demonstrating that regardless of the longevity considered (i.e., 200 years, 1000 years, greater than 1000 years), tailings disposal schemes must be designed to withstand the Probable Maximum Flood (PMF). Such designs would be consistent with the prescriptive requirements already adopted by NRC, such as: minimizing the upstream drainage area; siting where there is good wind protection; providing relatively flat slopes; and specifications for long-lasting rock covers.

NRC regards EPA's standards as "performance standards," but EPA's longevity standard is not a *performance standard* as NRC uses the term. The standard is quite similar to important nonprescriptive elements of NRC's existing Appendix A requirements in that it specifies performance *objectives* for the design of tailings disposal systems. NRC has established prescriptive requirements as a means of implementing certain nonprescriptive elements of such designs. We do not agree that conforming NRC's requirements to the EPA standard requires changes in NRC's existing prescriptions. Indeed, UMTRCA specifically reserves such specifications to NRC and these NRC detailed technical requirements are therefore not made superfluous by their being absent from EPA's standards.

Rather, these provisions are consistent with the standards and useful for their implementation. They should be retained.

The ANPR suggests that the institutional control provisions of EPA's standards are inconsistent with NRC's Appendix A requirements. We disagree. With respect to active maintenance, EPA noted in its Preamble that institutional contols can play a "useful secondary role in supplementing passive controls and in assuring during the early period of disposal that passive controls are adequate to achieve their design objectives" (48 F.R. 45936). EPA's belief that institutional controls could serve as an "essential backup to passive controls" does not imply, as NRC appears to conclude, that EPA authorized *reliance* on institutional measures. Rather, EPA required that the tailings cover *itself* be designed to provide reasonable assurance of long-term control. Such control, as a matter of design, is to be afforded by passive means. (This longevity requirement for radiological hazards is not diminished by separate additional requirements for nonradiological hazards.) Consistent with Congress' intentions, however, EPA recognized that institutional measures could and should be employed to remedy the situation if a cover should fail to perform as designed. The discussion in NRC's ANPR, therefore, does not provide a sufficient basis for changing NRC's existing requirement prohibiting planned reliance on institutional measures, and this requirement should be retained.

B. EPA's Groundwater Protection Strategy

The regulations promulgated by EPA under Subtitle C of RCRA were designed to address contamination of groundwater by hazardous wastes. By adopting and implementing standards equivalent to these EPA regulations, NRC will fulfill its responsibilities for the protection of groundwater. EPA has published a "Groundwater Protection Strategy" [cite], which may be used as the basis for amendments to the Agency's regulation and as guidance in implementing these parts of the RCRA regulatory

scheme that allow for administrative decisions about the appropriate level of groundwater cleanup. A copy of the Strategy is enclosed for NRC's information. NRC may wish to consider the establishment of additional groundwater protection requirements based on the Strategy.

C. Responses to Specific Questions (numbered as in the ANPR)

(1) "Should the SWDA-comparable requirements to be placed in the NRC requirements be explicitly restated to precisely duplicate EPA's language or should substantive requirements be paraphrased?"

Response: The ANPR states that NRC would review "EPA's SWDA regulations, including Subpart A (except Section 264.3), B, C, D, E, F, G, H, J and K . . . in developing a proposal to determine which of those requirements would need to be incorporated in NRC regulations" to conform to EPA's SWDA regulations in compliance with Section 84a(3). This and other language of the ANPR is unclear concerning the degree to which NRC intends to conform its regulations to SWDA requirements. Section 84a(3) states that NRC should adopt conforming regulations that are "to the maximum extent practicable, at least comparable to" EPA requirements under the SWDA. Relevant EPA requirements include those in all of the Subparts mentioned above, as EPA noted in its preamble (48 *Fed. Reg.* 45942).

By precisely duplicating EPA's language, NRC will ensure uniformity between the regulations. Paraphrasing substantive sections could possibly lead to erroneous or multiple interpretations of the regulations and should be avoided. To avoid this, we recommend that substantive sections of EPA's regulations be explicitly restated, except where the NRC and EPA regulations will be different in administrative aspects (e.g., the use of "Regional Administrator" would be inappropriate).

(2) "Should all of Subpart F be included? What should not be included?"

Response: Subpart F provides a comprehensive regulatory mechanism for groundwater protection. EPA adopted parts of Subpart F in its standards for mill tailings. Other parts address substantive issues of central relevance to implementing the standards and to complying with the requirements of Section 84a(3) of the AEA. It is our opinion that all of Subpart F should be included in the NRC Regulations.

(3) "What should be included in a listing of hazardous constituents for mill tailings to replace the 375-item long list in Appendix VIII to 40 CFR Part 261 referenced in 40 CFR 264.93? Should constituents not usually present or not present above trace levels be included? What criteria should be applied to decide what constituents should be included?"

Response: Under 40 CFR 264.93(b), a procedure exists for excluding Appendix VIII constituents from the list of hazardous constituents specified in the facility permit. NRC should use the criteria specified in 40 CFR 264.93(b) to exclude any constituent that it feels is not appropriate to monitor for at specific uranium mill tailing sites. However, a generic waiver under Section 264.93(b) could be a very difficult demonstration. We note that "hazardous constituents" are those that have been detected groundwater underlying a regulated unit *and* that are reasonably expected to be in or derived from waste in the unit. EPA is currently reviewing the Appendix VIII list in order to develop a better list of constituents for ground water monitoring at RCRA facilities. We would be glad to share this list with NRC when it is available.

(4) "NRC must establish SWDA-comparable requirements to the maximum extent practicable. In this context, what is practicable given current practice and the current state of technology?"

Response: Congress intended that nonradiological hazards of tailings not be subject to less control than are similar hazards from wastes regulated under the SWDA. The requirement to be at least comparable to EPA's

SWDA requirements, "to the maximum extent practicable," does not establish current practices or technologies as independent limits on NRC's obligation. EPA knows no reason why requirements and protection comparable to those for wastes regulated under the SWDA are impracticable for uranium mill tailings.

(5) "Should NRC retain the basic sequence embodied in Subpart F where licensees who detect groundwater contamination progress through a graduated scale of action, from detection monitoring, through compliance monitoring, and on the corrective action, with significant time delays allowed between steps while plans and programs are being developed, reviewed, and implemented? Would it be advisable, practicable or appropriate to require, for example, that all NRC licensees have approved compliance monitoring programs that are automatically activated and implemented when-needed?"

Response: We believe that the ground water monitoring and response sequence embodied in Subpart F is a logical progression of activities that protects human health and the environment and at the same time allows for flexibility. Under that sequence if hazardous constituents from a regulated unit have not entered the ground water, then a facility must at least have a detection monitoring program. This is to ensure that any leakage from the facility is detected. Once hazardous constituents appear in the groundwater, then, at a minimum, a compliance monitoring program is necessary to decide if ground water performance standards have been exceeded. If standards have been exceeded, then a corrective action program is logically required.

The NRC should be aware that the monitoring and response actions are not necessarily independent events with significant delays between each step. The permit may contain a combination of any of the three programs and specify the conditions under which each will be met (see §264.91(b)). That is, a permit may contain detection monitoring, compliance monitoring, *and* corrective action, with

criteria already built into the program to trigger the next step automatically. This will avoid the delays referred to in the NRC question.

The NRC suggestion of having approved compliance monitoring programs is a commendable recommendation. The preamble to Subpart F regulations (47 FR 32291, July 26, 1982) discusses this idea along with the suggestion of a corrective action plan that could be triggered by the occurrence of some event (e.g., the appearance of contamination).

(6) "Should the basic SWDA scheme for the timing and duration of a "compliance" period, a "closure" period, and a "post-closure care" period be maintained? What modifications, deletions, additions should be made?"

Response: The EPA standard (40 CFR 192, Subparts D and E) specifies two time periods that are not the same as in the SWDA regulations. Section 192.32(a)(2)(iii) requires that detection monitoring programs be completed (in operation) within one year of promulgation of the standard. Section 192.33 requires that any corrective action program be put into operation as soon as practicable, and in no event later than 18 months after a finding that the standards of Section 192.32(a)(2) are exceeded. In addition, the Preamble for Subparts D and E (48 F.R. 45942-3) discusses reasons why NRC might establish closure and post-closure periods for uranium mill tailings piles that are different from the SWDA requirements for hazardous wastes. The Preamble also notes that establishing the compliance period is an NRC responsibility. All these NRC actions, however, must be comparable, to the maximum extent practicable, to EPA's requirements under the SWDA.

(7) "To what extent, how, and under what conditions should leak detection systems under single-liner impoundments be allowed to fulfill the requirements for a detection monitoring program that otherwise requires a monitoring well in the uppermost aquifer."

Response: We recommend that in no case should leak detection systems under single-liner impoundments be allowed to fulfill the detection monitoring program. Because such leak detection systems are not sufficiently reliable they do not represent adequate safeguards for detecting contamination of the ground water. Therefore, if NRC allows use of such systems, it should document its reasons for believing they will be adequate.

(8) "How detailed should NRC's regulations be, and what should and should not be required in areas such as well construction, sampling and sample analysis, determinations of annual average and seasonal background concentrations, minimum detection levels, statistical treatment of data and determinations of statistically significant differences, recordkeeping and reporting, quality assurance, etc?"

Response: We recommend that NRC regulations be at least as detailed as the Subpart F regulations. EPA addresses many of these subjects in guidances on how to comply with Subpart F rules. However, we recognize that many of these areas require further research and development efforts. EPA is involved with several projects to prepare additional guidances in many of these areas. We would be glad to share these guidance documents with NRC upon availability. NRC should maintain flexibility in its regulation and continue to coordinate with EPA on these issues.

(9) "To what extent must NRC provide supporting environmental impact analyses considering the nature of the requirements under consideration, some of which have already been imposed by EPA and are effective? If supporting environmental evaluations are needed for SWDA-comparable rule changes except for the requirements already imposed by the EPA, should the NRC continue to proceed with only a single rulemaking to establish a complete set of SWDA comparable requirements?"

Response: EPA believes that little new supporting documentation is needed for these SWDA-comparable rule changes, apart from whatever technical analysis may be

needed to establish comparability, because the regulations at issue implement environmental and health protection decisions that have already been made in EPA's and NRC's previous rulemakings. Documentation developed in the previous rulemakings (e.g., EPA's FEIS, EPA 520/1-83-008-1 and 2, and NRC's FGEIS, NUREG-0706), NRC's site-specific environmental statements for uranium and thorium mills, and other literature related to NRC's and EPA's waste management programs, provide an ample basis for such new rules.

(10) "Is the flexibility cited in the proposed addition to the Introduction of Appendix A 10 CFR Part 40 sufficient or should the NRC develop and support additional modifications to conform to the physical stability aspects of the EPA standard?"

Response: We have discussed the extent of NRC's flexibility under Section 84c in our previous comments. EPA believes that this flexibility can be implemented by incorporating the language of Section 84c in the Introduction to Appendix A, as NRC has proposed. We suggest, however, that NRC establish a mechanism to provide public notice and an opportunity for comment when Section 84c is to be applied. In view of the site-specific nature of Section 84c, further rulemaking to establish general alternatives to existing general NRC requirements seems inappropriate.

If you have any questions concerning EPA's comments, please call Dr. W. Alexander Williams (382-5909) of my staff.

Sincerely,

ALLAN HIRSCH
Director
Office of Federal Activities

Enclosures

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Nos. 85-1279, 85-1280 and 85-6404

In The

Supreme Court of the United States

October Term, 1985

AMERICAN MINING CONGRESS, AND UNITED NUCLEAR CORPORATION, *ET ALIA*, CHAUNCEY KEPFORD (PRO SE),

Petitioners,

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, AND ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

INTERVENOR—RESPONDENTS ENVIRONMENTAL DEFENSE FUND'S AND SIERRA CLUB'S BRIEF IN OPPOSITION

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AMERICAN MINING CONGRESS, AND UNITED NUCLEAR CORPORATION, *ET ALIA*, CHAUNCEY KEPFORD (PRO SE),

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Respondents.

Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

INTERVENOR—RESPONDENTS ENVIRONMENTAL DEFENSE FUND'S AND SIERRA CLUB'S BRIEF IN OPPOSITION

The American Mining Congress ("AMC"), United Nuclear Corporation, *et al* ("UNC"), and Chauncey Kepford (pro se) each separately petition for a writ of certiorari to review two closely related judgments of the United States Court of Appeals for the Tenth Circuit.

The judgments below were entered on September 3, 1985. Rehearing was denied on October 30, 1985.

The Environmental Defense Fund and Sierra Club were petitioners and intervenor-respondents in the cases below. For the reasons stated herein, the Environmental Defense Fund and Sierra Club respectfully urge that UNC's and AMC's petitioners for a writ of certiorari be denied, and that Chauncey Kepford's be granted.

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OPINIONS BELOW

The opinion of the court below, upholding (with one exception not relevant here) the Environmental Protection Agency's standards for cleaning up uranium mill tailings at abandoned tailings sites, is reported at 772 F.2d 616. The opinion of the court below, upholding the agency's standards for disposal of uranium mill tailings at active mill sites, is reported at 772 F.2d 640. The Environmental Protection Agency notices of final rulemaking were published at 48 Fed. Reg. 590 (January 5, 1983) and 48 Fed. Reg. 45926 (October 7, 1983). These materials have been reproduced by both UNC and AMC, and filed with their petitions.

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STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Uranium Mail Tailings Radiation Control Act of 1978, codified as amended at 42 U.S.C. § 2014 and at scattered sections thereafter, and at 42 U.S.C. §§ 7901-7942, are reprinted in petitioners' appendices. The Environmental Protection Agency's Standards for Remedial Actions at Inactive Uranium Processing Sites ("Inactive Site Standards") and the agency's Environmental Standards for Uranium and Thorium Mill Tailings at

Licensed Commercial Processing Sites are codified at 40 C.F.R. Part 192 and are reprinted in petitioners' appendices.

STATEMENT OF THE CASE

The petitions filed by American Mining Congress and United Nuclear Corporation have one attribute in common: both misrepresent the seriousness of the health risks associated with uncontrolled uranium mill tailings.[1] As a consequence, it is necessary to set the record straight to understand the threat to the public presented by radiation and other toxic substances released to the environment as byproducts of the process for extracting uranium oxide from uranium ore.

A. The Evidentiary Record Supports Congress' Decision to Require Standards

Most uranium mills produce partially refined uranium, called "yellowcake," by processing finely crushed uranium ore through a series of acid baths that leach out 80 to 90 percent of the uranium isotopes. Since the uranium content of the ore averages only about 0.15 percent, virtually the entire bulk of the ore that is mined and processed is discarded as waste known as "tailings." 48 Fed. Reg. 45926, 45927. With the exception of the extracted uranium, most of the radioactivity in the mined ore remains in the tailings because radium, thorium and other isotopes in the chain of radioactive decay are not extracted.[2] The tail-

1. Currently, only one major thorium mill is licensed, while there are twenty-six active uranium mills. This brief uses the term "uranium mill tailings" or "mill tailings" to refer to the waste product of both uranium and thorium mills.

2. Most of the uranium recovered from crude ore is uranium-238, which naturally decays over time to lead-206 (a stable, or nonradioactive element). Most of the intermediate decay

(Continued on following page)

ings also contain residues of a variety of hazardous substances that are used in the extraction process or that are produced as a result of exposing all the minerals in the ore to an acid bath. In short, the tailings bear little resemblance to the physically and chemically stable ore-bearing formation from which they are derived.[3]

As of January 1983, there were twenty-seven licensed uranium mills, of which fourteen were operating. 48 Fed. Reg. 45927. By that date, 175 million metric tons of uranium mill tailings had accumulated at the active mill sites. *Id.* Based on Department of Energy statistics, the Environmental Protection Agency (EPA) estimated that an additional 175 million metric tons of tailings will be generated in this country by the year 2000. Finally, another twenty-six million metric tons of tailings remain to be disposed of at the twenty-six abandoned mill sites designated for clean-up under the Uranium Mill Tailings Radiation Control Act (UMTRCA). 48 Fed. Reg. 592.

1. Radiological risks associated with tailings

While mill tailings emit both radioactive particulates and gamma radiation to the ambient atmosphere, total exposure estimates show that the release of radon gas to the atmosphere is the single greatest hazard to human health. 48 Fed. Reg. 593 Radon is a radioactive, but chemically inert, gas that is produced by the radioactive

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(Continued from previous page)

products in the uranium series become part of the tailings. Thorium-230 is the radionuclide with the longest half-life, and it decays to form radium-226, and then to radon-222. 1 *Final Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Ore Processing* 3-2 to 3-3 (Sept. 1983) (hereinafter ctied as *Active Site EIS*).

3. *See* Nuclear Regulatory Commission, 1 *Final Generic Environmental Impact Statement on Uranium Milling* at 4 (Sept. 1980) (hereinafter cited as *Generic Impact Statement)*

decay of radium, which in turn is the product of the decay of thorium. Radon has a half-life of 3.8 days so that after 12 days, 90% of it will decay to polonium, a solid that stays put. When radon is formed in the undisturbed formations from which uranium ore is extracted, most of it decays and remains locked in the earth before it can diffuse to the atmosphere. But when radium in the uranium ore is bought to the surface and pulverized in the mill for processing, radon is released directly to the atmosphere. Radon is released in much higher concentrations from tailings piles than it is from undisturbed soil and rock: radon emissions from an acre of tailings are about 200 to 900 times greater than from an acre of undisturbed soil. 1 *Active Site EIS* at 3-5. As a result, the air above and downwind of piles contains much higher radon concentrations than would otherwise be present as a result of background emissions from the earth. *Id.*

Radon gas presents a unique hazard to human health because it diffuses readily into the atmosphere from tailings and exposes the cell layer lining the lung to a concentrated dose of radiation. Monitoring studies performed downwind from abandoned tailings piles show radon levels 5 to 12 times greater than "normal" background concentrations.

Radon undergoes eight radioactive decay events before it transforms into nonradioactive lead. Three of these decay events produce alpha particles[4] and occur within one hour after the first. Unlike radon, these "daughter"

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4. Alpha particles are composed of four nuclear particles (neutrons and protons) and therefore have many times greater mass and weight than do gamma or beta radiation. Thus, alpha particles can do significant damage to any cell they penetrate, including causing changes in the genetic code of a cell which can make it become cancerous.

isotopes are electrically charged and, if inhaled, will stick to the bronchial epithelium—an especially vulnerable tissue.[5] For persons exposed to above-normal radon levels, the lungs are continually bombarded by excess alpha radiation as radon and its daughters decay.

Consequently, radon is recognized as a potent carcinogen. As EPA concluded, epidemiological studies of underground miners demonstrate that there is a substanstantially increased risk of lung cancer due to elevated exposure to radon decay products. 48 Fed. Reg. 45928. Working from the best available scientific evidence, EPA developed a methodology for correlating excess risk of fatal lung cancers with radon exposure. While EPA conceded that its estimates of risk from inhalation of radon decay products exceed those of some agencies, EPA's risk estimate is essentially identical to that prepared by a subcommittee of the National Academy of Sciences[6] and is about 20% lower than that of the Atomic Energy Control Board of Canada.[7] *Id.* EPA also concluded that a linear dose response curve should be used in quantifying risk from radon, even though a linear dose response curve may *underestimate* risk at low exposure levels.

From its analysis, EPA reached several conclusions of importance here. First, lung cancer attributable to radon exposure is the dominant radiation hazard from tailings. The risk of fatal lung cancer for persons exposed continuously to radon concentrations found near a tailings pile is as high as 2 persons in 100. *Id.* at 45929. Second,

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5. *See* 1 *Generic Impact Statement* at C-4.

6. National Academy of Sciences, *The Effects on Populations of Exposure to Low Levels of Ionizing Radiation* (1980).

7. D.C. Thomas & K.G. McNeill, *Risk Estimates for the Health Effects of Alpha Radiation* (1982) (prepared for Atomic Energy Control Board of Canada).

based on models for the cumulative risk to all exposed populations, the radon released from inactive tailings piles, uncontrolled existing piles at active mill sites and new tailings expected to be added by year 2000 would cause more than 800 lung cancer deaths per century. *Id.;* 48 Fed. Reg. 593. And third, EPA showed that its standard for tailings disposal would *reduce* the risk for maximally exposed populations to only about 1 in 1000. 48 Fed. Reg. 45937.

2. Risks from nonradioactive toxic substances

While the threat of ground water contamination engendered less scientific debate, the risk associated with nonradioactive toxic substances is no less real. Mill tailings can contain, depending upon the ore source and the chemical reagents used in the milling process, high concentrations of toxic substances such as arsenic, lead, selenium, and molybdenum. 1 *Active Site EIS* at 3-8. And because the tailings consist of both liquids and solids, toxic substances can leach from a disposal site and can migrate through the underlying soil to contaminate ground water. Indeed, ground water contamination is *known* to have occurred at eight inactive and seven active uranium mill sites and may be occurring at others, where monitoring investigations have not yet been conducted. 48 Fed. Reg. 45931. As a consequence, the EPA's standards establish a regulatory program for detecting and cleaning up ground water contamination.

B. Statutory and Regulatory Background

"From the early 1940's through the 1970's there was little official recognition of the hazards presented by these tailings. Federal regulation of the industry was minimal."[8] Nevertheless, evidence was accumulating that the

8. H.R. Rep. No. 1480 (Part 1), 95th Cong., 2d Sess. 11 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7433.

front end of the nuclear fuel cycle posed real risks to human health and the environment. The health risks linked to misuse of tailings in the construction of houses and other structures gave an added impetus for congressional action. And by the time Congress began hearings on uranium mill tailings, the record was compelling. In testimony before Congress, EPA stated that radon gas is "a very carcinogenic material," and that even if controlled to twice background the risk of lung cancer "is 100 times higher than the risk we get from the air pollutants vinyl chloride or benzene which are very carcinogenic."[9] [EPA ultimately selected a standard that reduces radon emissions only to a level that is *twenty* times background.]

In response to the evidence before it, Congress determined that "[l]egislation is needed now to stabilize and control all such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public."[10] Title I of the Uranium Mill Tailings Radiation Control Act of 1978 established a program for reclamation of mill tailings at inactive mill sites by the U.S. Department of Energy. To deal with active mill sites, Title II directed EPA to establish standards of general application "for the protection of the public health, safety, and the environment from radiological and nonradiological hazards associated with" uranium processing and disposal of byproduct materials (tailings). 42 U.S.C. § 2022(b)(1).

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9. *Uranium Mill Tailings Control Act of 1978: Hearings on H.R. 11698, H.R. 1229, H.R. 12938, H.R. 12535, H.R. 13049, H.R. 13650 Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce*, 95th Cong. 2d Sess. 400 (1978).

10. H.R. Rep. 1480 (Part 2), 95th Cong. 2d Sess. 29 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7456.

On January 3, 1983, EPA issued final standards for disposal of tailings at inactive mill sites. EPA set numerical limitations on radon emissions from the piles and also set standards for cleaning up homes and other structures constructed with tailings. 48 Fed. Reg. 590-604; 40 C.F.R. Part 192, Subparts A-C. The radon emission limitation requires installation of "covers" over the tailings to trap the radon long enough for it to decay before it is released to the air, but the standards do not specify the details of cover design or mandate use of specific cover materials. 48 Fed. Reg. 595. The residential standard requires the removal of tailings used as landfill or used in concrete to build basements, foundations, patios and driveways. *Id.*, 595-96.

On October 7, 1983, EPA issued nearly identical radon standards for disposal of tailings at active mill sites. 48 Fed. Reg. 45926-45927; 40 C.F.R. Part 192, Subparts D-E. As it had done for inactive sites, EPA concluded that tailings should be controlled to reduce radon emissions to 20 picocuries per square meter per second (20 pCi./m^2/sec), but left to the Nuclear Regulatory Commission the responsibility for determining what measures must be implemented to ensure achievement of this standard at specific sites. 48 Fed. Reg. 45933. Unlike the inactive site standards, EPA also promulgated primary and secondary standards for preventing or remedying ground water contamination. Those standards are modeled upon the standards issued pursuant to Subtitle C of the Solid Waste Disposal Act, as amended, (also known as the Resource Conservation and Recovery Act) as Congress directed in UMTRCA. 42 U.S.C. § 2022(b)(2). Thus, mill licensees are required to monitor for ground water contamination and must undertake corrective action if groundwater contamination in excess of specified concentrations is discovered.

REASONS WHY UNC'S AND AMC'S PETITIONS SHOULD BE DENIED

A. The Decision Below Is Not At Odds With The Statutory Command Or With Prior Decisions Of This Court

UNC maintains that EPA ignored congressional intent and a prior decision of this Court by failing to make a threshold finding of "significance." AMC maintains that EPA violated congressional intent by setting standards that apply within the boundaries of mill sites. Both petitioners clearly are wrong. In these two respects, EPA's standards are not in conflict either with the language of the statute, with the congressional intent, or with prior decisions of this Court.

1. No agency finding of significance is required

UNC relies heavily on this Court's decision in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (the *Benzene* case) for the proposition that prior to regulating releases of radioactive and other hazardous substances from mill tailings, EPA must independently assess the health risks associated with those emissions and then determine whether the health benefits to be gained from regulation are "significant." The *Benzene* decision clearly does not apply here. In that case this Court was construing a *different* statute. This Court's decision in the context of that statute does not govern the statutory scheme before the Court in the present case.

Benzene reversed the decision of the Secretary of Labor to reduce permissible levels of worker exposure to benzene under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("OSH Act") That statute

delegates "broad authority to the Secretary to promulgate different kinds of standards" to reduce exposure to all sorts of hazardous materials in the workplace. *Benzene*, 448 U.S. at 611. The purpose of that Act is "to assure so far as possible *every working man and woman in the Nation* safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). The statute applies, in one estimate, to *sixty million* workers, *Benzene*, 448 U.S. at 691 (Marshall, J. dissenting), and embraces regulation of the full range of carcinogenic and toxic substances found in the workplace.

No single rationale was adopted by a majority of the Court in Benzene. But in response to a decision to reduce exposure to benzene based solely on the agency's policy of reducing exposure to carcinogens, the Court read section 3(8) of the OSH Act to require

> the Secretary to find, as a threshold matter, that the toxic substance in question poses a significant health risk in the workplace and that a new, lower standard is therefore "*reasonably necessary or appropriate* to provide safe or healthful employment and places of employment."

Benzene, 448 U.S. at 614-15 (quoting section 3(8) of the Act) (emphasis added).

This Court's decision, remanding the benzene standard to the Secretary for a threshold finding of "significance," turned on the precise terms of the Act's language. The central question addressed by Benzene was whether evidence that a contaminant is a carcinogen, without any regard for the magnitude of the potential hazard it posed to workers, a legally sufficient factual predicate for the Secretary to exercise his discretion to commence the standard-setting process under the OSH Act. The Court held

that a judgment regarding the degree of hazard was required before the Secretary could find that a new standard was "reasonably necessary." This Court did not, in the *Benzene* case, establish a general rule of law of sweeping scope that includes within its purview statutes, such as the Uranium Mill Tailings Radiation Control Act, in which Congress has already decided that regulations were necessary.

UMTRCA was enacted by Congress to deal with the specific health hazards attributable to mill tailings at both abandoned and active mill sites. Congress had determined, before the Act was passed, that radioactive emissions from tailings pose a serious threat to human health and that they should be stabilized and controlled. Unlike the OSH Act, Congress did *not* merely authorize the Adminstrator of the EPA to evaluate whether regulatory action is needed and then set standards if he found them to be "reasonably necessary or appropriate." Rather Congress mandated action by EPA and set an ambitious schedule for promulgation of standards. The realm of discretion left to the Administrator was substantially narrowed compared to the OSH Act. The threshold question of whether to regulate was already decided. The only remaining issue is to what degree.

"Statutory analysis must begin, of course, with the language of the statute." *Watt v. Alaska*, 451 U.S. 259, 265 (1981). The language of UMTRCA leaves little doubt as to Congress' intent. The express purposes of this Act are to provide

> (1) in cooperation with the interested states, Indian tribes, and the persons who own or control inactive mill tailings sites, a program of assessment and *remedial action* at such sites. . . .

> (2) a program *to regulate* mill tailings during uranium or thorium ore processing at active mill operations and after termination of such operations *in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public.*

42 U.S.C. § 7901(b) (1), (2) (emphasis added).

In order to ensure achievement of those purposes, Congress mandated EPA, in virtually identical language, to promulgate "standards of general application for the protection of public health, safety, and the environment from radiological and nonradiological hazards" associated with mill tailings at both active and inactive mill sites. 42 U.S.C. §§ 2022(a), (b). Further, Congress established in the Act a comprehensive program—including the details of site ownership and creation of indemnity funds—for carrying out stabilization, control, and disposal of tailings, leaving little doubt of the legislature's intention.

This legislative scheme reveals *no* indication that Congress intended that, at the outset, EPA should determine *whether* generally applicable standards are needed. Congress merely delegated to EPA the authority to determine *how* mill tailings were to be reclaimed. The legislative history and the policies that Congress sought to implement buttress that conclusion. *See Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

In its discussion of need, the House Interior Committee stated that tailings "contain many naturally-occurring hazardous substances, both radioactive and nonradioactive," including radon gas. H.R. Rep. No. 1480 (Part 1), 95th Cong., 2d Sess. at 11 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7433. Thus, the Committee stated that UMTRCA "is intended to protect

the public health and safety and the environment from hazards associated with" uranium tailings. *Id.* at 13, *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7435. And the Committee certainly envisioned promulgation of standards of general application by EPA. *Id.* at 16-17, *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7438-7439. The Commerce Committee report mirrors these statements of congressional intent. H.R. Rep. No. 1480 (Part 2), 95th Cong., 2d Sess. at 29, 34-35 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7456, 7461-7462.

Not only is there no explicit evidence that Congress intended EPA to make a "significance" finding, there also is no implicit evidence to that effect. Petitioners' efforts to pull this case within the principles enunciated by the plurality in the *Benzene* case are unavailing.[11] In this instance, EPA did what Congress directed it to do: it evaluated the sources and pathways of human exposure to toxic substances, and issued standards to reduce radiation health hazards.

The 1982 amendments to UMTRCA do not counsel a different conclusion. Pub. L. No. 97-415, § 22(b), 96 Stat. at 2080, *codified at* 42 U.S.C. § 2022(a), (b). The Conference Report emphasizes that the amendments were intended merely to clarify that when EPA set standards it should "consider the risk to public health, safety, and the environment, the environmental and economic costs of such standards of regulations, and such other factors as EPA or NRC, respectively, determine to be appropriate."

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11. Petitioners somewhat disingenously suggest that in this case EPA maintained that it must set standards "without regard to the significance of" risks. United Nuclear Corporation, *et al.*, *Petition for a Writ of Certiorari* at 14. To the contrary, EPA examined a *range* of standards and weighed a number of factors, including an assessment of health risks attributable to radiation and other health hazards released from the tailings.

H.R. Rept. No. 884, 97th Cong., 2d Sess. 47 (1982). The conferees certainly never indicated that they wished to impose another hurdle to promulgation of standards or that they intended to make discretionary the duty to set standards. Indeed they expressed strong disappointment that EPA had failed to meet the statutory deadline for standards, and reemphasized that "EPA and NRC recognize as their paramount responsibility protection of the public health and safety and the environment." *Id.* at 47.

Viewed as a whole, the language of UMTRCA and the record of the legislative process demonstrate that Congress expected swift issuance of standards to eliminate or minimize health hazards from mill tailings. Congress manifestly did not impose a threshold burden of finding that those risks are "significant," since Congress already decided that standards were required. Thus, the teachings of the *Benzene* case are inapposite. The regulated community no doubt finds the EPA standards unwelcome. But petitioners' effort to draw into question the agency's authority has no basis. Petitioners' recourse properly is to Congress, not to this Court.[12]

2. EPA did not exceed its statutory authority

AMC takes a different tack in challenging EPA's standards. AMC asserts that the language used in UMTRCA, requiring issuance of "standards of general application," should be read to preclude standards that operate within the confines of a mill site. As with the

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12. As the Court has said before, it should "reject a theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent and that restricts . . . a remedial Act. . . ." *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981), *quoting Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 278-79 (1977).

other industry petition, AMC can point to no explicit or implicit statement that supports their position.

It is true, as petitioners point out, that prior to enactment of UMTRCA, EPA's authority under the Atomic Energy Act was limited by the 1970 Reorganization Plan[13] to issuance of "generally applicable environmental standards" that were specifically defined as limits on exposure "in the general environment outside the boundaries" of regulated facilities. But the UMTRCA legislative history makes clear that Congress intended to close a large gap in regulation of health risks associated with mill tailings, and that EPA standards were to play an important role in this new regulatory structure. UMTRCA does not adopt the language from the 1970 reorganization plan and does not limit EPA's standards to areas outside the boundaries of mill tailings sites. The legislative history contains no hint that Congress intended such a result.

On the contrary, the bill reported out of the House Interior Committee would have accomplished the result AMC contends for here had it not been amended. The Interior Committee bill mandated promulgation of generally applicable standards "for the protection of the general environment outside the boundaries of" uranium tailings sites. H.R. Rep. No. 1480 (Part 1), 95th Cong., 2d Sess. 6 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7433.[14] But the bill reported out by the Commerce Com-

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13. Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 5 U.S.C. App. p. 1132 (1982).

14. Even had that provision been enacted into law, it would not have barred issuance of standards that *apply* within the boundaries of a mill site if EPA determined such standards were needed to protect the environment outside the site boundaries.

mittee a few weeks later, drafted to reconcile several different bills, did not include that limitation. H.R. Rep. No. 1480 (Part 2), 95th Cong. 2d Sess. 24 (1978), *reprinted in* 1978 U.S. Code, Cong. & Ad. News at 7450. Instead, the bill enacted into law mandates issuance of "standards of general application" which are then to be implemented by NRC and the Department of Energy—without any limitation of the sort petitioners would have this Court engraft on the unambiguous statutory language.

Not only did Congress not limit EPA's authority in the manner argued by AMC, Congress contemplated standards that could be applied within mill site boundaries. First, it would have made no sense to limit EPA's authority at inactive mill sites to set standards that apply *outside* the boundaries of inactive tailings piles. These piles long since had been abandoned and were to be cleaned up with federal and state funds. Yet Congress used virtually identical language in directing promulgation of standards at both active and inactive sites. Congress rejected a geography-based limitation on standards. Congress clearly required a *functional* separation between EPA's role in standard-setting and the NRC/Department of Energy role in implementing those standards, but the fact that the NRC and DOE are charged with the duty to implement EPA's standards does not support a conclusion that EPA's standards are not to apply on-site.

Second, following House passage of H.R. 13650, that bill was put before the Senate. 124 Cong. Rec. 36687 (1978), which already had considered its own bill. Senator Garn proposed an amendment in the nature of a substitute to the House-passed bill, *id.* at 36688, which had been "coordinated in advance with the House." Again, that bill

made no mention of any site-boundary limitations on EPA's authority.

Senator Randolph, chairman of the Environment and Public Works Committee, cosponsored the Garn amendment. Senator Randolph stated that the section-by-section analysis of a similar Senate bill (S. 2584) provided the basis for his support of H.R. 13650. 124 Cong. Rec. 36697 (1978). That analysis "attempted to further define" the relative roles of NRC and EPA, and stated that "[EPA] is . . . to prescribe general standards of performance, not specific management requirements and not site-specific." *Id.* In elaborating on that analysis, Senator Randolph stated his understanding that EPA's standards could include general standards for site design and preparation; general pile stabilization standards; and *limitations on emissions from mill tailings* "in the air or ground or surface waters. . . ." *Id.* EPA's limit on the release of radon from tailings is clearly consistent with the measures described by Senator Randolph.[15]

AMC is unable to point either to statutory language or to legislative history to support the theory it advances before the Court. The Act and its history simply do not support petitioner's argument that the lower court's decision is at odds with congressional intent.

Petitioner's reliance upon *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), is similarly misplaced. In *Train*, the court of appeals concluded that EPA was required by the Clean Water Act to regulate discharges of radioactive pollutants, including "source,

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15. The Garn amendment was adopted and passed by the Senate, 124 Cong. Rec. 36699 (1978). Subsequently, the House approved the Senate bill with only slight modifications not relevent here. *Id.* at 38230.

byproduct, or special nuclear materials" as defined by the Atomic Energy Act. In doing so, the appellate court relied exclusively on the statute's language, and ignored explicit guidance found in the legislative history to the effect that such discharges are not covered by the Clean Water Act. *Train*, 426 U.S. at 11. On the basis of those legislative materials, this Court reversed the appellate court decision.

The contrast between *Train* and the law of this case is compelling. There is no evidence from the legislative materials that in enacting UMTRCA Congress intended to artificially constrain EPA to the issuance of standards that apply only outside the boundaries of a mill. In fact, the contrary is true. Consequently, there does not exist in this case either a conflict between the Tenth Circuit's decision and prior decisions of this Court or an erroneous construction of a federal law the purpose of which was to prevent or minimize human exposure to radioactive and other toxic substances.

B. The EPA Standards Will Be Implemented Without Causing Conflict Among Federal Agencies

AMC also contends that the EPA standards will disrupt the administrative framework for regulating uranium mills and mill tailings. However, this argument does not withstand careful scrutiny and can be easily disposed of.

On October 16, 1985, the Nuclear Regulatory Commission issued final rules to conform its mill tailings requirements to the EPA standards. 50 Fed. Reg. 41852-41866 (Oct. 16, 1985). During that proceeding the industry petitioners made much the same arguments as they advance before this Court. *See* 50 Fed. Reg. 41853-54 (legal arguments on EPA/NRC jurisdictional issue). In response, the Commission concluded that "EPA generally

acted within its jurisdiction and found the [AMC] arguments flawed." *Id.*

Thus, the Commission already has completed one round of rulemaking to adopt and enforce the EPA standards, and has begun a second round of rulemaking to deal with EPA's ground water protection requirements, 49 Fed. Reg. 46425 (Nov. 26, 1984). It appears that the agencies do not share AMC's concern that EPA's standards may disrupt implementation. They appear to be resolving the difficulties that are inherent in inter-agency coordination and there is no basis for assuming that the agencies will not continue to cooperate in carrying out the mandate of UMTRCA.

THE KEPFORD (PRO SE) PETITION

Kepford presents two questions: 1) the illegality of executive office intervention in the rulemaking, and 2) EPA's failure to identify, analyze and consider alternatives for tailings disposal that would guarantee long-term control consistent with Congressional intent. Both questions deserve review by this Court.

1. OMB's Role in the Rulemaking

Kepford argues that the Executive, through the Office of Management and Budget ("OMB"), unconstitutionally interfered in the decision delegated by law to the Administrator of the Environmental Protection Agency. The central premise underlying Kepford's argument is that the Executive may not direct executive branch officials to act contrary to law. The ultimate inquiry we believe, is whether OMB's unquestioned influence over the final decision[16] resulted in a rule that violated the Congressional mandate of UMTRCA. We think it did.

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16. EPA never disputed Kepford's claim below that OMB directly influenced the outcome of the Agency's decision in the rulemaking.

OMB pressure was aimed at forcing EPA to adopt a cost-benefit approach to setting health standards.[17] It succeeded. EPA's initial mill tailings proposal contained no balancing of costs vs. benefits, but rather considered costs only in the context of choosing from among those regulatory options that would achieve the health protection goal defined by the Agency on the basis of cancer risk.[18]

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17. In sworn testimony on September 27, 1983, before the House Subcommittee on Oversight and Investigations, John E. Daniel explained that OMB pressured EPA to take a cost-benefit approach in the uranium tailings rulemaking contrary to the advice of EPA attorneys. Mr. Daniel was chief-of-staff to the Administrator, Anne Burford, at the time of those events. An excerpt from the hearing transcript is quoted here:

> Mr. Gore: Do you know of any instances in which OMB directed EPA to take regulatory action which the Agency believed was contrary to a specific statute?
>
> Mr. Daniel: * * *
>
> The other example I would cite to you, Mr. Gore, is with respect to something called uranium mill tailings. * * * EPA's role in this is purely one of setting the health standard for a person that would be exposed to the tailings pile. In terms of the costs that were involved, ultimately it would be the Department of Energy that would have paid for those through proposed funds. So the check, the cost-benefit analysis of this, was in the hands of the Congress. Our job is just to set the health standards.
>
> But we were urged to set different kinds of standards that would have been based on the cost of doing these cleanups of these mill tailings piles that were out of line with what the statute told us, at least on the basis of advice we were getting from our lawyers at EPA, as to the constraints on the Agency to set the standards.
>
> Mr. Gore: Did you tell them that would be a violation of the law?
>
> Mr. Daniel: We did.

Hearings before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, H.R. 98-98, September 27-28, 1983. See also the letter from OMB to EPA cited by Kepford.

18. *Draft Environmental Impact Statement for Remedial Action Standards for Inactive Uranium Processing Sites* at 8-6 (EPA, December, 1980).

But the final rule specifically relied on what EPA described as an "optimized cost-benefit" approach. 48 Fed. Reg. 591 (January 5, 1983). Although EPA in the inactive site rulemaking never explained what it meant by "optimized cost-benefit," or how it went about calculating which regulatory option best fit the "optimized cost-benefit" approach, the Agency had fully succumbed to OMB's pressure to weigh costs directly against health benefits, and abandoned the approach of defining health protection goals first, then looking for the most cost-effective way of meeting those goals.

The consequence of the OMB approach was EPA's rejection of standards it had initially proposed that were far more protective of health than the final standards. EPA's initial limit on the release of radon from tailings would have reduced radon emissions to two times the natural radon emissions from undisturbed earth. 46 Fed. Reg. 2559, col. 1-2 (January 9, 1981). This standard, EPA concluded, would "virtually eliminate" all lung cancer deaths attributable to radon from tailings.[19] In contrast, EPA's final standard for both inactive and licensed tailings piles, based on OMB's optimized cost-benefit approach, allows radon emissions 20 times higher than natural emissions. According to EPA, the final standards will allow about 35 deaths per century for the first 10 centuries, and then many more deaths during the next 800 to 1,000 centuries.[20]

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19. 1 *Final Environmental Impact Statement for Remedial Action Standards For Inactive Uranium Processing Sites* at 101 (EPA, October, 1982) ("Inactive EIS").

20. EPA calculated that its relaxed radon standard for active piles would allow about 25 deaths per century, and permissible radon releases from inactive tailings piles would cause 10 deaths per century. Inactive Site FEIS, vol. 1, 101; Active Site FEIS, vol.

(Continued on following page)

EPA also claims to have relied on OMB's cost-benefit approach as the reason for substantially weakening the standard that triggers the removal of tailings from homes and other structures. EPA's indoor radon standard would not trigger cleanup even when individual lung cancer risks are as high as 1.3-in-100 (about 1-in-65). Inactive Site EIS, Table 7-1, 108.

2. Cost-benefit analysis not consistent with UMTRCA

Clearly, the 1983 Amendment to UMTRCA directed EPA to "consider costs."[21] But as this Court has held, authority to consider costs is not the same as authority to

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1, 10-6. EPA only considered the fatalities that will result from the radon released during the period of compliance with the standard, i.e., the first 10 centuries, Inactive Site EIS, 98-100; even though EPA concedes that tailings will continue to emit radon at approximately the current rate for about 1,000 centuries. Inactive EIS, 16-17. Presumably this is because the rule only requires tailings controls to be effective for 200 to 1,000 years. As Kepford has argued, EPA has not explained its decision not to account for the rapid increase in deaths that will occur after the first 10 centuries when the earthen covers erode. In calculating future fatalities EPA also assumes that no new tailings will be created after year 2000, even though EPA projected that total tailings will double by year 2000 as a result of continuing production.

21. EPA performed a cost impact analysis that shows the industry could afford to achieve the standards that would prevent all deaths. EPA found that the costs of the more stringent standards *might*, at most, force only one small mill to close. Final Regulatory Impact Analysis ("FRIA"), Table 5.5, 5-12. EPA also found it would cost $120,000 per life saved to eliminate virtually all fatalities, compared to $80,000 per life saved for the standard EPA chose. Average Cost Per Death Avoided, Table 4.6, FRIA, 4-11. EPA found that the cost of both standards was acceptable in reference to the costs the public says it is willing to pay to save a life: "all control methods fall below the lower end of the empirical range." FRIA, 4-12. EPA also decided that the $0.07 to $0.09 added to each homeowner's monthly utility bill that would result from choosing to prevent all deaths was certainly not a basis for rejecting that option.

base decisions on a formalized cost-benefit analysis. "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *American Textile Manufacturers Institute v. Donovan,* 452 U.S. 488, 510 (1981). Here none of the statutory indicators identified by this Court in *Donovan* as providing authority for cost-benefit analysis are present.

As the Court in *Donovan* recognized, cost-benefit analysis gives the decision-maker virtually unbridled discretion to select the outcome by the value assigned to benefits. Where the benefit is not valued in the marketplace, such as the value of human life, the degree of health protection to be provided has no bounds.

The Court rejected the argument that the OSH Act required cost-benefit analysis in setting worker health standards because

> . . . Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in [the Act]. Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.

American Textile Manufacturers Institute v. Donovan, 452 U.S. 488, 509 (1981). Given Congress' principal focus on protecting health from radiation, and its directive to control tailings to the "maximum extent allowed by the state of the art," the same principle applies to UMTRCA.

In addition to the lack of statutory language authorizing cost-benefit analysis, the conference committee report accompanying the 1983 amendment makes clear that Congress had no intention of delegating to EPA unfettered discretion to weigh health benefits against costs.

> Moreover, in adopting the language [requiring consideration of cost], the conferees intend neither to divert EPA and NRC from their principal focus on protecting the public health and safety nor to require that the agencies engage in cost-benefit analysis or optimization.

H.R. Rept. No. 97-884, 97th Cong., 2d Sess. 47 (1982). Congress did not authorize the "cost-benefit" approach which EPA says it used to select the radon standard in this case. EPA's rulemaking decision is clearly inconsistent with the mandate of the 1978 Act to "eliminate radiation health hazards to the public." It is also inconsistent with the express intent of the 1983 amendment to authorize consideration of cost, but not in an unbounded cost-benefit analysis.

In the legislative history of the 1978 Act, Congress declared its intent that hazards associated with mill tailings should be reduced to the degree achievable by the use of state-of-the-art technology, i.e., by what is feasible:

> Uranium mill tailings disposal sites should in all cases be controlled and regulated . . . to the maximum extent allowed by the state of the art, to insure that the public and the environment will be protected from the hazards of the tailings for as long as they may remain a hazard.

H.R. Rept. No. 95-1480 (Part I) 95th Cong., 2d Sess. 17-18 (1978). Thus to the extent Congress intended EPA to consider factors other than the human health and environmental protection goals of the 1978 Act, they were limited to consideration of the degree of control achievable by application of the "state of the art." Clearly, costs were not to be weighed against the health protection benefits achievable by use of feasible control measures. If public exposure to "radiation health hazards" could feasibly be "eliminated," such as would be achieved by adop-

tion of the 2 pCi standard (according to EPA), then that level of protection should have been required. If the radiation health hazards could not be feasily eliminated, then "radiation health hazards" were to be "minimized" to the extent feasible.

The congressional directive to "eliminate" if feasible, or otherwise minimize radiation health hazards was not compromised by the 1983 amendment authorizing consideration of costs. First, it is important to note that the language defining the central policy of the Act to "minimize or eliminate radiation health hazards to the public" was not amended, or otherwise undermined by the amendment. On the contrary, the conferees made it extremely clear that they had no intent "to divert EPA and NRC from their principal focus on protecting the public health and safety. . . ." H.R. Rep. No. 97-884, *supra*, 47. They made a special effort in the committee report to emphasize that

> [a]t all times, the conferees fully intend that EPA and NRC recognize as their *paramount responsibility* protection of the public health and safety and the environment.

Id. 47 (emphasis added). These declarations of the conference committee demonstrate that by adding authority to consider cost, Congress did not amend by implication or otherwise compromise or undermine the basic policy goal of the 1978 Act.

This conclusion is also supported by the committee's approval of the regulatory approaches taken by both NRC and EPA *prior* to the deliberations of the conferees. The committee debates on the cost amendment occurred in August 1982, and the committee report was printed in September. At that time, more than four months prior to

EPA's first decision to adopt a cost-benefit approach for setting radon standards in the inactive site rulemaking, the committee saw itself as merely providing authority for the approaches that both NRC and EPA had previously adopted in dealing with the cost question:

> The conferees note that this language reflects accurately the current regulatory approach of the agencies. The language agreed to by the conferees should not result in any delays of establishment of remedial action standards. EPA, for example, has already advised the conferees that it is considering costs in formulating its inactive site requirements. In addition, the NRC has testified before Congress that it, too, took costs into account in promulgating its Uranium Mill Licensing Requirements.

H.R. Rept. No. 97-884, *supra*, 47.

In order to understand what Congress thought it was approving, it is necessary to review the public positions both agencies had taken prior to the summer of 1982. In the case of the NRC, it had adopted final tailings disposal standards pursuant to UMTRCA. 45 Fed. Reg. 65521 (October 3, 1980). In review proceedings before the Tenth Circuit, as well as in the rulemaking, the NRC argued that costs were relevant only to the extent they were considered as part of a determination that the standards are "feasible," i.e., both technologically and economically feasible.[22] The committee members made frequent references

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22. NRC's interpretation of UMTRCA was affirmed by a panel of the Tenth Circuit in an opinion handed down on March 23, 1982, or about four months prior to the deliberations of the conference committee. *Kerr-McGee Nuclear Corp. v. NRC*, 673 F.2d 1124 (10th Cir. 1982); vacated pending rehearing en banc. The order granting rehearing was issued after publication of the conference report. Further proceedings in that case have been stayed pending further action by the NRC in response to the EPA regulations that are the subject of this proceeding.

to the opinion of the panel of the Tenth Circuit sustaining NRC's regulations and were obviously aware of both the NRC's argument and the panel's approval of the NRC's position. In fact, the committee report went out of its way to state that the cost amendment was not intended to "affect[] any pending litigation or appeal of judicial decisions based on the fundamental missions or responsibilities of the agencies." H.R. Rept. No. 87-884, *supra*, 47. It would appear that the committee specifically intended to approve the NRC's interpretation of the Act and not disturb the March 1982, opinion of the Tenth Circuit with regard to that question.

The official pronouncements of EPA on the cost question prior to the summer of 1982 were consistent with the NRC's position and gave no warning of the major shift in policy that would be revealed months later in the final inactive site standards. EPA had initially proposed a 2 pCi standard for radon emissions from inactive piles (46 Fed. Reg. 2562, January 9, 1981), and explained in its draft EIS, p.8-6, that the Agency was justified in considering other factors, such as cost, once a marginal level of health benefit is achieved. Thus in choosing between standards at 2 pCi and 0.5 pCi, EPA considered cost a relevant factor because either standard would "avert virtually all these cancer deaths [from radon]." EPA's proposal had rejected cost as a factor in determining the acceptability of less stringent standards that would allow many cancer deaths.

While there is no discussion by the committee of EPA's 1981 proposal that would suggest the committee members were as aware of EPA's earlier treatment of the issue as they were of the NRC's interpretation of the Act affirmed by the Tenth Circuit, the committee nonetheless

expressed approval of EPA's approach. The committee's obvious satisfaction with EPA's initial approach is further evidenced by enactment of the last sentence of 42 U.S.C. 2022(a) as part of the 1983 amendment. That amendment directed DOE to proceed with implementation of the remedial action program at the inactive sites based on EPA's *proposed standards* if final EPA action was not forthcoming by the revised statutory deadline.

At no point prior to the committee's deliberations was there any hearing testimony or other communication from EPA that revealed an intent to abandon the earlier approach and adopt the cost-benefit approach used here. If the conferees were aware of OMB's July 1982 letter to EPA, it would appear that the committee's specific rejection of cost-benefit analyses in the report must have been designed to put the OMB demand to rest. Unfortunately, EPA has ignored the committee's intent and has carried its economic justification for rejecting more protective standards far beyond the limits authorized by the 1983 amendment.

EPA's use of OMB's "optimized cost-benefit" approach for setting health protection standards under UMTRCA is not consistent with the statute, legislative history or the prior decision of this Court. Foisted on EPA over the opposition of Agency attorneys who, according to John Daniel, were of the opinion that it was illegal, the optimized cost-benefit approach is now appearing in many other contexts of agency decision-making. This case presents an uncommon opportunity to decide whether Congress ever intended to allow the Administrator unbridled discretion to sacrifice achievable health benefits solely on the basis of cost. Kepford is right: OMB may not coerce EPA to use cost-benefit analysis to set health

standards when the statute does not authorize cost-benefit analysis.

CONCLUSION

For these reasons, UNC's and AMC's petitions for a writ of certiorari should be denied, and the Kepford petition should be granted.

Respectfully submitted,

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Nos. 85-1279, 85-1280 and 85-6404

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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED NUCLEAR CORPORATION, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

AMERICAN MINING CONGRESS, PETITIONER

v.

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

CHAUNCEY KEPFORD, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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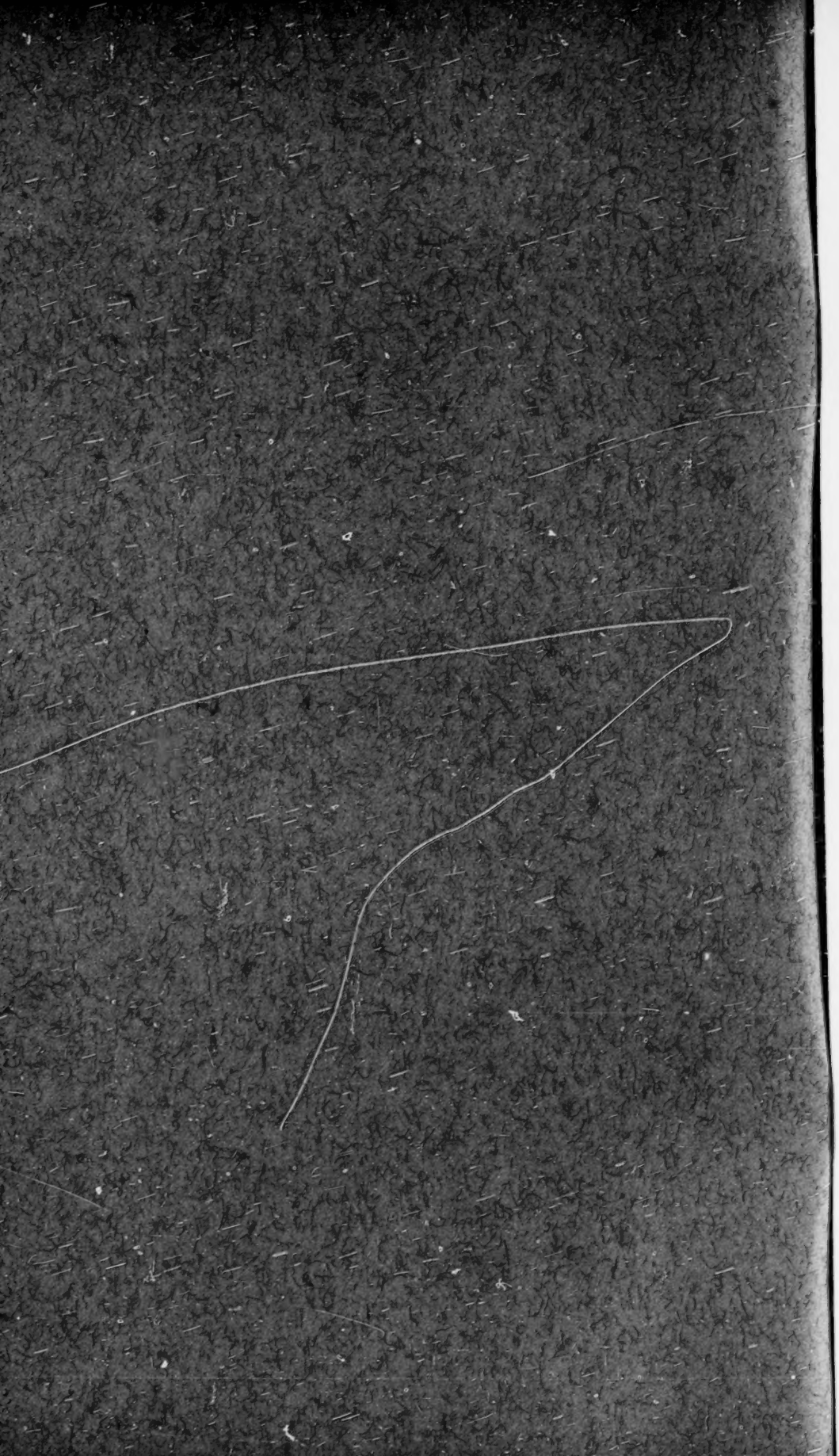

QUESTIONS PRESENTED

1. Whether the Uranium Mill Tailings Radiation Control Act of 1978 requires the Administrator of the Environmental Protection Agency (EPA) to make a finding of significant risk in promulgating standards under the Act (No. 85-1279).

2. Whether that Act authorizes the EPA Administrator to establish general standards that apply within the boundaries of disposal sites for uranium mill tailings (No. 85-1280).

3. Whether, in promulgating standards under that Act, the EPA Administrator gave adequate consideration to alternative measures focusing on protection of the public health and the environment after 1,000 years (No. 85-6404).

4. Whether there was improper Executive Branch influence on the promulgation of the EPA standards governing inactive sites (No. 85-6404).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1279

UNITED NUCLEAR CORPORATION, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

No. 85-1280

AMERICAN MINING CONGRESS, PETITIONER

v.

LEE M. THOMAS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 85-6404

CHAUNCEY KEPFORD, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-42a, 43a-64a)[1] are reported at 772 F.2d 617 and 772 F.2d 640.[2]

JURISDICTION

The judgments of the court of appeals were entered on September 3, 1985. Petitions for rehearing were denied on October 30, 1985 (Pet. App. 209a-210a, 211a-212a). The petitions for writs of certiorari were filed on January 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

Relevant portions of the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. 2022, 7901, are reproduced at Pet. App. 213a-216a.

STATEMENT

1. a. Uranium and thorium mill tailings are a waste byproduct of the processing of uranium ore. After processing, the ore yields a uranium-rich compound called "yellow cake" and a residue (typically of coarse sand) constituting the mill tailings. The yellow cake is a very small percentage (about 0.15%) of the original material. Pet. App. 128a. The rest of the ore thus must be disposed of as mill

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[1] Unless otherwise noted, "Pet. App." references are to the separately bound appendix to the petition in No. 85-1279.

[2] The Agency standards at issue in those proceedings and the Environmental Protection Agency (EPA) Administrator's preamble to those rulemaking proceedings are reported at 48 Fed. Reg. 590 (1983) (Pet. App. 65a-121a), and 48 Fed. Reg. 45926 (1983) (Pet. App. 122a-208a). The standards are codified at 40 C.F.R. Pt. 192, Subpts. A-E.

tailings. Uranium ore processing operations produced about 160 million tons of tailings between 1948 and 1970. About 25 million tons, one-sixth of this total, are stored in piles at 24 inactive sites,[3] 1 Office of Radiation Programs, U.S. Environmental Protection Agency, *EPA 520/4-82-013-1, Final Environmental Impact Statement for Remedial Action Standards for Inactive Uranium Processing Sites (40 CFR 192)*, 15-18, 20-21 (Table 3-1) (1982) [hereinafter cited as *Inactive Sites FEIS*]. Tailings piles at the inactive sites cover an estimated total of 1,000 acres, in areas of from 5 to 150 acres at individual sites, and range in height from a few feet to as much as 230 feet. The quantity of tailings at individual inactive sites ranges from trace amounts to approximately 2.7 million tons. Pet. App. 74a; 48 Fed. Reg. 592 (1983).

The rest of the mill tailings are at "active sites": primarily operating uranium mills licensed by the Nuclear Regulatory Commission (NRC) or by the state in which they are located.[4] By early 1983, the total amount of stored tailings at the active sites had reached about 175 million metric tons, with the size of individual tailings piles ranging from 2 to 30 million metric tons. That quantity is expected to at least double by the year 2000. Pet. App. 128a-129a; 48 Fed. Reg. 45927 (1983).

b. Mill tailings contain hazardous materials, both radioactive and nonradioactive. The most significant

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[3] Inactive sites include both inactive mill sites and depository sites (42 U.S.C. 2022(a)).

[4] As of January 1983, there were 14 such licensed uranium mills in operation. Although the regulations at issue here also apply to thorium mill tailings, the only major thorium mill licensed is not operating. 48 Fed. Reg. 45927.

of these materials is radium, a product of radioactive decay.[5] The decay of radium, in turn, produces radon, a radioactive gas that can escape from the tailings into the environment. The amount of radon gas released into the air remains constant for many thousands of years—essentially indefinitely. *Inactive Sites FEIS* 15-18.[6]

The radioactive constituents of uranium mill tailings, such as radium and radon, have been determined to be carcinogenic and can contribute to genetic and fetal damage. These hazards arise because (1) the radioactive decay products of radon may be inhaled, increasing the risk of lung cancer; (2) individuals may be exposed to penetrating gamma radiation from the tailings; and (3) radioactive and toxic materials may be ingested with food or water. Pet. App. 74a-75a; 48 Fed. Reg. 45928 (1983).

2. a. On November 8, 1978, Congress enacted the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), Pub. L. No. 95-604, 92 Stat. 3021 *et seq.* Its action was based on the specific finding (§ 2 (a), 42 U.S.C. 7901(a)) that:

> uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public, and that the protection of the public health, safety, and welfare and the regulation of interstate commerce require that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally

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[5] Other potentially hazardous mill tailings constituents include arsenic, molybdenum and selenium (Pet. App. 75a; 48 Fed. Reg. 45928 (1983)).

[6] Some of the non-radioactive toxic chemicals also persist indefinitely (48 Fed. Reg. 45928 (1983)).

> sound manner of such tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings.

The Act accordingly established a program for remedial action at both active and inactive sites (§ 206 (a), 42 U.S.C. 2022).

The Act conferred the principal responsibility for the actual implementation of the inactive mill site remedial action program on the U.S. Department of Energy (DOE) and its Secretary (§§ 102-108, 42 U.S.C. 7912-7918). The United States Environmental Protection Agency (EPA) and its Administrator were directed to promulgate general standards for the implementation of the DOE remedial program (§§ 206(a), 108(a), 42 U.S.C. 2022, 7918(a)).[7]

The Act also sought to "control * * * tailings [at active sites] in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public" (§ 2(b)(2), 42 U.S.C. 7901(b)(2)). It did so, first, by expanding the definition of "by-product material" under the Atomic Energy Act of 1954 (AEA), 42 U.S.C. (& Supp. II) 2011 *et seq.*, to include uranium and thorium mill tailings, thereby bringing such tailings within the scope of NRC's licensing authority under that Act (§ 201, 42 U.S.C. 2014(e)(2) (see 42 U.S.C. 2111-2114)). Second, UMTRCA required NRC to regulate mill operations and disposal sites, through the NRC-administered licensing process of the AEA, so as to control mill tailings in accordance with general standards promulgated by EPA. Congress required

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[7] DOE must also consult with the Secretary of the Interior, and obtain the concurrence of the NRC in remedial actions selected (§ 108(a)(1), 42 U.S.C. 7918(a)(1)).

EPA to "promulgate * * * standards of general application for the protection of the public health, safety, and the environment from radiological and nonradioactive hazards associated with the possession, transfer, and disposal of" tailings at licensed disposal sites (which may be existing mill tailings sites or other sites to which tailings may be moved). § 206(a), 42 U.S.C. 2022(b)(1).

b. As originally enacted, Section 206(a) of UMTRCA, 42 U.S.C. 2022, imposed upon EPA a one-year deadline for the development of final remedial action standards for inactive sites, and an 18-month deadline for the final active site standards. When the Administrator failed to meet either of these deadlines, Congress, reflecting its dissatisfaction with the delay, amended Section 206 to extend the deadline for inactive site standards to October 1, 1982, and to require, in the event the extended deadline was not met, that remedial action should commence, utilizing the standards which had been proposed by the Administrator in April 1980. The amendment also required the Administrator to promulgate final active site standards by October 1, 1983, and provided that, if the Administrator failed to take final action by that date, authority to promulgate active site standards would pass to the NRC. Act of Jan. 4, 1983, Pub. L. No. 97-415, § 18(a)(1), 96 Stat. 2077, amending 42 U.S.C. 2022(a). At the same time, Congress added a sentence to Section 206(a) of UMTRCA (42 U.S.C. 2022(b)) to clarify the range of factors it intended the Administrator to consider in developing the standards:

> In establishing such standards the Administrator shall consider the risk to the public health, safety, and the environment, the environmental

> and economic costs of applying such standards, and such other factors as the Administrator determines to be appropriate.

§ 22(b)(2), 96 Stat. 2080, amending 42 U.S.C. 2022(b)(1).

3. EPA had already proposed inactive site standards when the 1982 amendments to UMTRCA were enacted. In April 1980, the Administrator proposed "cleanup" standards to govern the cleanup of tailings which had been transported from a "processing site" to a nearby "vicinity property". 45 Fed. Reg. 27370.[8] Proposed standards for disposal of tailings removed from vicinity properties and for those located in the original tailings piles were published in January 1981 (46 Fed. Reg. 2556).

The proposed standards applicable to the permanent stabilization of the tailings piles included a radon emission limitation (expressed technically as a radon "flux" standard) of 2 picocuries per square meter per second (2 pCi/m^2s), together with a requirement that the means used to limit radon flux be designed to provide a reasonable expectation that releases would be controlled for 1,000 years. These standards also included limitations on releases of contaminants to groundwater and surface waters which reflected generally prevailing EPA water quality standards. The proposed standards applicable to offsite land and buildings generally provided for cleanup of offsite land to a level of 5 pCi/g of contamination, and of buildings to a level of .015 work-

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[8] A "processing site" is the premises on which a processing mill and its attendant tailings piles are located, and "vicinity properties" are offsite locations to which tailings from the mill have been dispersed. See §§ 101(6), 102(a)(1) and (e)(1), 42 U.S.C. 7911(6), and 7912(a)(1) and (e)(1).

ing levels.[9] The proposed standards also provided an exception procedure allowing DOE, under certain described circumstances, to engage in remedial actions which did not meet the applicable standards, so long as such actions came "as close to meeting the [disposal] standard[s] * * * as is reasonable" under the circumstances. 46 Fed. Reg. 2563 (1981).

On January 5, 1983, after consideration of the extensive comments received, the Administrator promulgated final standards for Remedial Actions at Inactive Uranium Processing Sites (Pet. App. 65a-121a; 48 Fed. Reg. 590).[10] He noted (Pet. App. 65a-66a):

> The purpose of most of [the] changes [from the proposed standards] is to make implementation easier and less costly. The changes should not result in any substantial loss of health or environmental protection over that which would have been provided by the proposed standards.

The Administrator proposed active site standards for mill tailings at currently licensed milling sites on April 29, 1983 (48 Fed. Reg. 19584). Permanent

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[9] Working levels (WL) is a measure of concentration of radioactivity in air.

[10] The principal changes from the proposed standards were to set the radon emission limit at 20 pCi/m^{2}s rather than at 2 pCi/m^{2}s; to qualify the proposed 1,000-year longevity requirement by adding the phrase "to the extent reasonably achievable", and by adding a 200-year minimum longevity requirement; to set the cleanup standard for land at 15 pCi/g (instead of 5 pCi/g) for soil layers more than 15 centimeters below the surface; to establish a goal of .02 WL annual average indoor random concentration (and a maximum of .03 WL), instead of the proposed standard of .015 WL; and to delete proposed provisions which, in effect, prohibited any degradation of surface waters or groundwater by contaminants from the tailings.

disposal of the waste was to be designed to provide reasonable assurance that the average radon emissions from the tailings pile would not exceed 20 picocuries per square meter of the pile per second (20 pCi/m^2s).[11] The proposed standards provided for protection of groundwater to a level generally comparable to the protection required for surface impoundments under EPA regulations promulgated pursuant to the Solid Waste Disposal Act, 42 U.S.C. (& Supp. II) 6901 *et seq.*

On September 30, 1983, after considering all comments,[12] the Administrator promulgated the final active site standards. Pet. App. 122a-208a; 48 Fed. Reg. 45926.[13] In so doing, he concluded that uranium mill tailings "pose a present hazard to human health" and pose an additional substantial hazard for "an essentially indefinite period," due primarily to the long-term radiation hazards (Pet. App. 130a).[14] His

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[11] The size of the pile subject to this standard could be reduced by cleaning up the surrounding area to a standard of 5 pCi/g of radium for surface soil and 15 pCi/g of subsurface soil.

[12] Several hundred written comments were received, in addition to oral testimony from 34 witnesses at hearings held in Washington, D.C. and Denver, Colorado. "Comments were received from a broad spectrum of participants, including private citizens, public interest groups, members of the scientific community, representatives of industry, and State and Federal agencies." Pet. App. 125a-126a.

[13] Changes were made to several aspects of the groundwater protection requirements in response to comments (48 Fed. Reg. 45927 (1983)).

[14] Indeed, he concluded that "[i]n the long run the future risks to health of indefinitely extended contamination from misused and dispersed tailings due to inadequate control

estimates of the magnitude of the health risks were based on a widely-accepted scientific hypothesis that any radiation dose poses some risk, and that the risk from low doses is directly proportional to the risk that has been demonstrated at higher doses (*id.* at 131a). The final standards are based, however, on the recognition that "[i]t is not possible to reduce the risk to zero" and that deciding on the appropriate standard required an evaluation of the practicality, benefits, and technical difficulties associated with different levels of control (*id.* at 133a).

The final active site standards are divided into two parts. The first part applies to the management of tailings piles during and after cessation of milling operations but prior to completion of final disposal (Pet. App. 203a). The second part specifies the conditions to be achieved by final disposal (*id.* at 205a). The final active site disposal standards require long-term controls over emissions of radon gas from tailings piles: final disposal systems must provide reasonable assurance that average radon emissions from the "disposal area" do not exceed 20 pCi/m^{2}s for 1,000 years after disposal "to the extent reasonably achievable, and, in any case, for at least 200 years" (*id.* at 205a-206a).[15] Reducing radon emissions to

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overshadows the short-term danger to public health" (Pet. App. 130a).

[15] As in the proposed rule, the "disposal area" is defined according to how much cleanup would render land suitable for general use. This cleanup standard, as in the proposal (see note 11, *supra*), is 5 pCi/g for surface soil and 15 pCi/g for subsurface soil; any area that is cleaned up to these levels will not be considered a "disposal area" subject to the post-disposal radon emission standard or the primary groundwater protection requirements. Pet. App. 205a-206a.

this level eliminates more than 95 percent of the lung cancer risk associated with mill tailings. 2 Office of Radiation Programs, U.S. Environmental Protection Agency, *EPA 520/1-83-008-2, Final Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Ore Processing (40 CFR 192)*, at A.1-24 (1983) (response to comment 7) [hereinafter cited as *Active Sites FEIS*].[16]

4. Petitioners and others challenged both sets of standards by filing timely petitions for review pursuant to 42 U.S.C. 2022(c)(2).[17] In support of their challenges, petitioners raised numerous legal and technical objections, including the arguments pressed here. The court of appeals rejected all of petitioners' objections in separate opinions issued on September 3, 1985.[18]

The court of appeals, relying on the statutory findings, held that EPA was not required to find that the mill tailings piles pose a "significant risk" before promulgating regulations under the UMTRCA (Pet. App. 136a). It also found unpersuasive United Nuclear Corporation's (UNC) arguments, identical to those urged here, that the 1982 amendments and their

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[16] EPA estimated that "without control, the radon released directly from all tailings currently in existence at presently (1983) licensed sites would cause about 500 lung cancer deaths per century. * * * By the year 2000 * * * without control, the amount of tailings existing then would cause approximately 600 lung cancer deaths per century (Pet. App. 136a).

[17] Petitioner Kepford petitioned for review only of the active site regulations (Pet. App. 1a, 43a).

[18] It did find that the inactive site standards were inadequate in not providing for groundwater protection, and remanded the case to the agency "for further consideration of that specific provision" (Pet. App. 39a-42a).

legislative history signaled a significant change in the congressional approach to risk evaluation (Pet. App. 17a-19a, 50a).

The court of appeals noted that the "strict distinction between the EPA operating outside site boundaries and the NRC operating on-site" (Pet. App. 21a) originated in the standard-setting authority transferred to EPA from NRC's organizational predecessor, the Atomic Energy Commission, by the 1970 Reorganization Plan which created EPA.[19] However, the court concluded that neither the statutory language, the legislative history, nor the underlying congressional purpose supported the contention that "this strict distinction" also applied in the case of the standard-setting authorized by UMTRCA (Pet. App. 21a, 50a, 54a-55a).

Finally, the court of appeals rejected petitioner Kepford's complaint that EPA did not adequately consider the alternative of deep well disposal of mill tailings, noting that "EPA acted within its powers in rejecting this method, rationally finding it had potential for more serious ground water contamination" (Pet. App. 58a). The court of appeals did not find it necessary to address specifically petitioner Kepford's contentions concerning the asserted improper involvement of the Office of Management and Budget in the standard development process.

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[19] The Reorganization Plan, in pertinent part, defined the standard-setting authority in terms of "limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material." Reorganization Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970 comp.).

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or of any other court of appeals. Accordingly, they do not warrant review by this Court. Contrary to petitioners' assertions, the court of appeals applied the plain meaning of the statute; its decisions are in keeping with the legislative history, and the court did not err in recognizing that the Act vested EPA with a substantial measure of discretion to establish limitations for uranium mill tailings. The standards in question were promulgated after careful review of all comments and a detailed analysis of scientific evidence; they are well supported by the administrative record.

1. a. No significant risk finding is required under UMTRCA because Congress made that finding in enacting the statute. UMTRCA contains explicit congressional findings that because "uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public * * * the protection of the public health, safety, and welfare * * * require that every reasonable effort be made to provide for the stabilization, disposal, and control * * * of such tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings." § 2(a), 42 U.S.C. 7901(a). Based precisely on these findings, Congress determined "to provide * * * a program of assessment and remedial action at [inactive and active] sites, * * * in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health

hazards to the public." § 2(b)(1), 42 U.S.C. 7901 (b)(1).

The legislative history confirms the plain statutory findings: "The [House] committee is convinced that all tailings pose a potential and significant radiation health hazard to the public." H.R. Rep. 95-1480, 95th Cong., 2d Sess. Pt. 2, at 29 (1978).[20] Because of this hazard, Congress directed the Administrator of EPA to formulate standards to be implemented by the remedial action program the Act established. § 206(a), 42 U.S.C. 2022(a).

In 1983, Congress revised Section 206(a) of UMTRCA to direct the Administrator to "consider" risks, costs and "other factors as the Administrator determines to be appropriate," in setting standards within this basic framework. Pub. L. No. 97-415, § 22(b)(1), 96 Stat. 2080. Those revisions changed neither the recital of risks in the legislative preamble, nor the directive to regulate set out in Section 206(a). Indeed, Congress at the same time set a tight deadline for completing this regulatory task. Congress was intent upon endorsing and expediting an approach already being followed; it did not revise the basic criteria which were to control the Admin-

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[20] The House Committee report further noted that: "[T]he dangers which accompany [the mill tailings radioactive decay process] will continue for a billion years. As a result of being for all practical purposes, a perpetual hazard, uranium mill tailings present the major threat of the nuclear fuel cycle." H.R. Rep. 95-1480, *supra*, Pt. 1, at 11. Senator Randolph, a leading sponsor of UMTRCA in the Senate, stated that "the hazardous wastes from uranium mills present a long-ignored threat to the health and safety of our citizens. Although these mill tailings are far less toxic than spent fuel or high level waste, they persist for long periods of time." 124 Cong. Rec. 36696 (1978).

istrator's task.[21] As the Conference Committee explained (H.R. Conf. Rep. 97-884, 97th Cong., 2d Sess. 47 (1982)):

> The conferees note that this language reflects accurately the current regulatory approach of the agenc[y]. The language agreed to by the conferees should not result in any delays in establishment of remedial action standards.

The principal purpose of the Senate's addition of references to specific factors in Section 206(a) of UMTRCA was to provide an explicit basis in statutory language for the Administrator's consideration of implementation costs in setting standards.[22] The

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[21] Thus, the amendments to Section 206(a) provided that, should the Administrator fail to issue final remedial action standards by the new deadline, the standards he had *already* proposed would become effective for the interim period between that date and "such time as the Administrator promulgates such standards in final form." 96 Stat. 2077.

[22] As explained by Senator Simpson, the bill's floor manager and chairman of the subcommittee responsible for the bill (128 Cong. Rec. S13052 (daily ed. Oct. 1, 1982)):

> [t]he conferees have agreed to include specific references in the appropriate sections of the Atomic Energy Act directing EPA and NRC, in promulgating such standards and regulations, to consider the risk to public health and safety, and the environment, the economic costs of such standards or regulations, and such other factors as EPA or NRC, respectively, determine to be appropriate. Essentially, we intend by this requirement that these agencies must balance the costs of compliance against the projected benefits to assure that there is a reasonable relationship between the two.

The remarks of Senator Schmitt—upon which petitioners United Nuclear Corporation (UNC) et al. rely (Pet. 17-18)—are much less significant. Senator Schmitt was not a "co-

Amendment in no way purports to alter the clear intent of the enacting Congress "that every reasonable effort be made to provide for the stabilization, disposal, and control * * * of such tailings in order to prevent or minimize radon diffusion * * * and * * * other environmental hazards from such tailings," and the direction to the EPA Administrator to issue specifically described remedial action standards to accomplish this result.[23] § 2(a), 42 U.S.C. 7901(a).

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sponsor of the 1982 UMTRCA Amendments," as petitioners assert. He simply sponsored an unrelated provision to restrict uranium imports, ultimately rejected by the House as not germane. See 128 Cong. Rec. S13292-S13293 (daily ed. Oct. 1, 1982); 128 Cong. Rec. H8802-H8809 (daily ed. Dec. 2, 1982). Accordingly, the remarks cited by petitioners—which were printed in the Congressional Record (128 Cong. Rec. S13293 (daily ed. Oct. 1, 1982)) but not delivered on the floor—should be disregarded to the extent that they are inconsistent with the explanation of the bill's floor manager, Senator Simpson. See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 13-14 (1978); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942);

A similar pattern reoccurred in the House. The interpretations of the floor managers, Representative Udall and Ottinger, were consistent with the views of the Conference Report, while the inconsistent views of Representative Lujan of New Mexico, a member of the Conference Committee, were placed in the record as "extensions of remarks" one week after the floor debate. Compare 128 Cong. Rec. H8824-H3825 (daily ed. Dec. 2, 1982), with 128 Cong. Rec. E5059-E5061 (daily ed. Dec. 10, 1982).

[23] Senator Hart, the ranking minority member of Senator Simpson's subcommittee explained in floor debate (128 Cong. Rec. S13292 (daily ed. Oct. 1, 1982)): "none of these amendments affects the Findings and Purposes section of the Uranium Mill Tailings Act".

b. UNC relies upon this Court's decision in *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607 (1980), as support for the proposition "that new standards designed to abate insignificant risks are 'unreasonable' " (Pet. 14). The court of appeals correctly concluded that *Industrial Union* is inapplicable in the instant context. The Court's conclusion there turned on the language of the Occupational Health and Safety Act of 1970 (OSHA), 29 U.S.C. (& Supp. II) 651 *et seq.* As the Court explained (448 U.S. at 642 (emphasis in original)):

> By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," [Section 3(8) of] the Act [(29 U.S.C. 652(8))] implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. * * * [A] workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm.
>
> Therefore, before he can promulgate *any* permanent health or safety standard, the Secretary is required to make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices.

Thus, the plurality's holding in *Industrial Union* was based on OSHA's specific statutory scheme, which gave the Secretary of Labor broad authority to regulate work place safety according to priorities that *he* was to determine (448 U.S. at 643-644).

In sharp contrast, in enacting UMTRCA, Congress explicitly found that mill tailings at active and inactive sites "may pose a potential and signifi-

cant radiation health hazard to the public, and that the protection of the public health, safety, and welfare * * * require that every reasonable effort be made to provide" methods to reduce that risk (§ 2 (a), 42 U.S.C. 7901(a)). In light of that finding, there was no need for any agency reaffirmation of the risk identified by Congress.[24] As the court of appeals observed (Pet. App. 16a): "[i]n the UMTRCA Congress commanded the EPA, the NRC, and the DOE to deal with the problems posed by uranium mill tailings."

2. Petitioner American Mining Congress (AMC) errs in contending that EPA may only establish standards that apply *outside* the boundaries of mill tailings sites.[25] The statute does not prohibit EPA from setting standards that apply within the boundaries of disposal sites, so long as they are generally applicable rather than site-specific.

Although the starting point for determining the meaning of a statute is its language (*American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 508 (1981)), AMC is unable to point to any language in the statute that supports its construction.

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[24] In any event, in the standard setting process, EPA in fact extensively analyzed the risks involved and found them to be significant. See pages 9-10, *supra*.

[25] Petitioner contends that this restriction has been violated in three respects: EPA's radon emission limit (or "flux" standard), which regulates the rate of radon releases from mill tailings piles; the radium-in-soil cleanup standard; and the "primary" and "secondary" ground-water standards, all of which operate inside the current boundaries of mill tailings disposal sites (AMC Pet. 7-8). The radium-in-soil cleanup standard, however, is designed to permit the release of land for unrestricted use; such land thereafter will no longer be "within" the site.

UMTRCA simply does not contain the "off-site" limitation urged by AMC. EPA is instead required to promulgate "standards of general application" to protect "the public health, safety, and the environment from radiological and non-radiological hazards associated with" mill tailings. § 206(a), 42 U.S.C. 2022(a) and (b)(1). Nothing in this mandate even remotely suggests that such standards may not apply within the boundaries of disposal sites. On the contrary, when this language is read in conjunction with the Act's statement of findings and purposes,[26] the plain meaning is that EPA *may* promulgate regulations that apply within the boundaries of such sites, when appropriate to protect public health and the environment.

AMC relies heavily on the requirement that EPA's standards must be "of general application." But this requirement prohibits EPA from promulgating *site-specific* standards; it does not prohibit regulations that apply *within the boundaries* of disposal sites. EPA's regulations are not site-specific; they are generic standards that apply to all disposal sites. EPA therefore has violated no statutory mandate.

b. The legislative history is consistent with the plain meaning of the statute. Indeed, the legislative history shows that Congress deliberately chose *not* to limit EPA's authority in the manner suggested by AMC.

In 1970, President Nixon signed Reorganization Plan No. 3, transferring to EPA some of the func-

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[26] "[E]very reasonable effort [must] be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of * * * tailings in order to prevent or minimize radon diffusion into the environment." 42 U.S.C. 7901(a).

tions of the Atomic Energy Commission (subsequently reorganized in 1974 as the Nuclear Regulatory Commission). 3 C.F.R. 1072 (1966-1970 comp.). EPA was given the authority to set "generally applicable environmental standards", including "limits on radiation exposures or levels, or concentrations or quantities of radioactive materials, *in the general environment outside the boundaries* of locations under the control of persons processing or using radioactive material." § 2(a)(6) (3 C.F.R. at 1073) (emphasis added). The Reorganization Plan left unaltered the AEC's authority within such boundaries.

AMC argues (at 10-16) that, in enacting UMTRCA, Congress intended to codify all aspects of the division of responsibility between EPA and AEC (now NRC) set forth in Reorganization Plan No. 3, including the limitation on EPA's authority to set standards that apply only "in the general environment *outside the boundaries*" of licensed sites (*id.* at 10 (emphasis in petition)).[27] But this is not what happened.

In the House several bills worked their way through two different committees. Congressman Udall introduced H.R. 13382, 95th Cong., 2d Sess. (1978), which was referred to his Subcommittee on

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[27] AMC asserts (Pet. 11 n.14), that since UMTRCA as enacted uses the phrase "standards of general application," and Reorganization Plan No. 3 uses the phrase "generally applicable environmental standards," the reach of the standard-setting authority under both statutes is identical. The significant fact, however, is that the Reorganization Plan's explicit reference to standards which impose limits "in the general environment outside the boundaries" is conspicuously absent from UMTRCA. This omission demonstrates a deliberate congressional decision not to replicate the Reorganization Plan limitations in the UMTRCA.

Energy and the Environment of the Committee on Interior and Insular Affairs. Section 206 of that subcommittee's draft, dated July 27, 1978, added Section 275 to the Atomic Energy Act. It would have required EPA to "promulgate generally applicable standards for the protection of the general environment" from radiological and nonradiological hazards of mill tailings. It also specified that "such standards [shall] * * * impose limits on exposures or levels, or concentrations or quantities of hazardous materials *in the general environment outside the boundaries of*" processing or disposal sites (H.R. 13382, *supra*, at 15-16 (emphasis added))—the identical language found in Reorganization Plan No. 3 (3 C.F.R. 1072 (1966-1970 comp.)).

But, as reported by the full committee on August 11, 1978, the Udall bill (now numbered H.R. 13650, 95th Cong., 2d Sess.), no longer contained the language restricting EPA to "off-site" standards. The revised committee draft instead required EPA's standards to *protect the environment* outside such sites.[28]

That this change in language was deliberate and substantive is indicated by three factors. First, the Committee Report accompanying the bill conspicuously omits any reference to a site boundary limitation on EPA's authority. Nor is any such limitation mentioned in the summary of the bill, which merely refers to EPA's authority to protect the environment outside site boundaries. H.R. Rep. 95-1480, *supra*, Pt. 1, at 29. Second, in place of limiting EPA to "off-

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[28] As reported, the bill required EPA to "promulgate * * * generally applicable standards and criteria for protection of the general environment outside the boundaries" of processing and disposal sites. H.R. Rep. 95-1480, *supra*, Pt. 1, at 10.

site" standards, the report precluded EPA from promulgating "site-specific" requirements for "management, technology or engineering"—functions to be left to the NRC as the implementing agency (*id.* at 17). Third, the House report *enlarged* the types of requirements EPA would be authorized to establish; most relevant here, the report specifically indicated that EPA could regulate radon hazards by limiting the "quantities of the substances released [by a mill tailings pile] over a period of time" (*ibid.*) This is, of course, the radon emission (flux) standard approach which EPA decided to employ; it necessarily applies within the site boundaries, and the House report makes clear that EPA was to have the authority to issue such requirements (*id.* at 16-17, 21).

Concurrently with the proceedings in Congressman Udall's committee, Congressman Dingell's Subcommittee on Energy and Power of the Interstate and Foreign Commerce Committee was also considering H.R. 13650, where the pertinent legislative history was essentially duplicated. The subcommittee print dated August 4, 1978, required EPA to set standards "of general application" that "shall apply outside the boundaries * * *. However, this site boundary limitation was eliminated from the full Committee draft. In its place, as in the Interior Committee report, is simply a statement that "stresses that the EPA standards are not to be site-specific." H.R. Rep. 95-1480, *supra*, Pt. 2, at 46.

Thus, in both committees, the concept of a geoggraphy-based limitation on EPA's standard-setting authority evolved into a functional distinction based on EPA's and NRC's respective standard-setting and licensing roles: EPA would establish standards of

general applicability, and NRC would implement and enforce those standards on a site-specific basis.[29]

The Senate consideration of its bill is to the same effect. Senator Randolph, a co-sponsor of the Senate bill, in explaining its provisions to the Senate, pointed out that the relevant section-by-section analysis provides that the EPA Administrator is "to prescribe general standards of performance, not specific management requirements and not site specific" (124 Cong. Rec. 36697 (1978)). As examples of the kinds of "general standards" EPA was expected to promulgate, Senator Randolph cited "general requirements that sites be designed and managed to prevent any contact of the tailings by human or animal life * * *, general performance standards for stabilization of tailings * * * [and] [l]imitations on * * * emissions or other introduction of * * * constituents of mill tailings in the air or ground or surface waters" (*ibid.*). Such standards obviously would have to apply inside site boundaries.

The legislative history thus clearly supports the Administrator's construction of the Act, if any aids to interpretation are necessary. Both houses of Congress accepted a final bill that eliminated the very proscription against "on-site" regulation that AMC

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[29] Following the House's passage of H.R. 13650, that bill was put before the Senate (124 Cong. Rec. 36687 (1978)), which had already considered its own bill. Senator Garn, Chairman of the Nuclear Regulatory Subcommittee of the Senate Committee on Energy and Natural Resources, proposed an amendment (S. 2099, 95th Cong., 2d Sess. (1978)) in the nature of a substitute to the House-passed bill (124 Cong. Rec. 36688 (1978)). The Garn amendment was adopted and passed by the Senate (*id.* at 36699). The House then approved the Senate bill, with amendments not relevant here (*id.* at 38230).

claims to find in the law.[30] Both houses of Congress specifically mention on-site control measures, including a radon emission (flux) standard, as among the tools at EPA's disposal. As ultimately enacted, the law delineates a sensible division of responsibility between EPA and NRC that is based on their respective functions (general standard setting vs. site-specific licensing and implementation), while recognizing that EPA's regulations apply on-site as necessary to achieve the Act's goals of protecting against the potentially serious and long-term nature of the hazard involved.

3. a. Petitioner Kepford argues (at 16-18) that, in promulgating the challenged standards, the EPA Administrator failed to give adequate consideration to the disposal of uranium mill tailings in abandoned deep mines, or other long-term control strategies, in violation of Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C).

Every court of appeals that has considered the question has concluded that NEPA's procedural requirements relating to the preparation of an Environmental Impact Statement (EIS) do not apply to EPA's regulatory activities.[31] Here, the standards at

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[30] Indeed, as finally enacted, the legislation does not even limit EPA's authority to protection of the general environment "outside the boundaries," as the Udall Committee bill had provided; instead, it broadly directs EPA to protect against the hazards associated with mill tailings.

[31] *E.g., Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 379-387 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 676 (1st Cir. 1974); *Duquesne Light Co.* v. *EPA*, 481 F.2d 1, 9 (3d Cir. 1973), vacated, 425 U.S. 987 and 427 U.S. 902 (1976);

issue have been promulgated by the Administrator pursuant to a substantive statutory mandate and statutory procedures that are clearly designed to "ensure full and adequate consideration of environmental issues." *Environmental Defense Fund, Inc.* v. *EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973). Petitioner's argument that the Administrator's standards must be vacated for failure to comply with NEPA's requirement for consideration of alternatives accordingly is without merit.[32]

In any event, NEPA requirements were satisfied here. EPA did consider requiring the disposal of mill tailings in abandoned deep mines, the only extremely long-term disposal technique suggested by petitioner Kepford, but rejected it in light of the serious risk of contamination to regional groundwater resources associated with that technique. Pet. App. 145a. The court of appeals found that EPA acted rationally in reaching this conclusion (Pet. App. 58a); NEPA thus would not require that it be further considered.[33]

Appalachian Power Co. v. *EPA*, 477 F.2d 495, 508 (4th Cir. 1973); *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162, 174 (6th Cir. 1973), cert. denied, 425 U.S. 934 (1976); *Indiana & Michigan Elec. Co.* v. *EPA*, 509 F.2d 839, 843 (7th Cir. 1975); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301, 1305-1306 (10th Cir. 1973).

[32] The Agency has, since May 7, 1974, voluntarily undertaken the preparation of environmental impact statements as a part of its standard-setting process. This policy was implemented with the caveat that "[t]he voluntary preparation of impact statements, however, in no way subjects the Agency to the requirements of section 102(2)(C) of [NEPA]." 39 Fed. Reg. 37419. This policy was specifically invoked by the Agency in the draft Environmental Impact Statement.

[33] See Council for Environmental Quality Regulations at 40 C.F.R. 1502.14(a). The CEQ regulations are entitled to deference in construing the requirements of NEPA. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979).

Since petitioner has suggested no other extreme long-term control strategy that merited further consideration by EPA, its failure to discover and extensively consider other control strategies for periods exceeding 1,000 years does not require that the standards be vacated. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-554 (1978).

b. Although petitioner Kepford challenges no provision of the EPA standards at issue here as substantively defective, he argues (Pet. 2-8) that the regulations must be vacated and remanded for reconsideration because the Office of Management and Budget may have influenced EPA to inappropriately consider costs in determining the final form of the standards. In support of this argument, petitioner refers only to materials that relate to the EPA Administrator's standards for *inactive* uranium mill tailings sites. Pet. 4-5; Kepford Pet. Apps. E, F. Petitioner lacks standing to object to those standards here, since he did not challenge the inactive site regulations before the court of appeals.[34] In order to relate the cited materials to the proceedings below in the case in which he did participate, petitioner simply notes that "standards for active tailings [*sic*] were also under consideration by EPA at that time." Pet. 4. Petitioner's argument at best rests on no more than speculative inferences that the alleged improper influences on the inactive site regulations also affected the active site regulations. Hence, this contention, which was not presented in its present form below, does not warrant this Court's review.

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[34] This issue was not raised by any other petitioner in the separate proceedings before the court of appeals concerning those standards.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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v.

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ENVIRONMENTAL PROTECTION AGENCY
and
ENVIRONMENTAL PROTECTION AGENCY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Pursuant to Rule 22.5 of this Court's rules, petitioner submits this Reply to the Brief for the Federal Respondents in Opposition.

Respondents have advanced no valid reason for denying the Petition for Writ of Certiorari. To the contrary, their brief, when read in conjunction with the petition, demonstrates that review by this Court is clearly warranted.

Far more significant than what respondents have said in opposition is what they have *not* said:

1. Respondents ignore the fact that UMTRCA was enacted as an amendment to the Atomic Energy Act, under which a comprehensive regulatory scheme has existed since 1946 and under which (since 1970) the division of authority between the Atomic Energy Commission (now NRC) and EPA was well-established, well-known to Congress and observed by the agencies themselves. Petition for Writ of Certiorari at 4-6, 11 n.13 (hereinafter "Pet. at ___").

2. Respondents also fail to acknowledge the statements of principals of EPA and NRC, made prior to UMTRCA's passage, reaffirming the traditional division of authority between the agencies and recognizing that the division of authority would continue under UMTRCA, as the agencies interpreted the proposed legislation. Pet. at 13 and n.18. NRC would, therefore, operate inside the boundaries of mill tailings sites, and EPA outside.

3. Respondents also ignore the agencies' interpretations of UMTRCA made after its passage. In a legal opinion issued in 1981, EPA's General Counsel stated that the traditional division of authority between the two agencies was to be continued under UMTRCA. Pet. at 14 and n.19; Pet. Appendix at 242-245. Moreover, NRC's counsel has represented to the United States Court of Appeals for the Tenth Circuit that the traditional division of authority was maintained under UMTRCA and that EPA's authority was to promulgate general environmental standards consistent with Reorganization Plan No. 3 of 1970. Pet. at 14-15.

4. Moreover, the federal respondents fail to address, or even mention in passing, this Court's decision in *Train v. Colorado Public Interest Research*

Group 426 U.S. 1 (1976), in which EPA had argued—and this Court agreed—that changes in the pervasive regulatory scheme created by Congress under the Atomic Energy Act were not to be lightly inferred. Pet. 16-17.

5. Finally, respondents do not dispute that EPA's interpretation of its authority as affirmed in the decision below has led to a conflict between the agency and NRC that may keep the UMTRCA program in turmoil for years. Pet. at 18-19.

Nowhere throughout the entire course of these proceedings have the federal respondents addressed or explained any of the foregoing items. The court below did not address them either. Respondents' brief continues this void. Respondents rely instead on the "plain language" of the statute and simplistically contend that, since the words "outside the boundaries" nowhere appear in the statutory language, EPA was justified in inferring a congressional intent to change the preexisting regulatory scheme under the Atomic Energy Act, and was therefore justified in determining that it had the power to regulate within the boundaries of mill tailings sites. Respondents argue that their position is correct and that petitioner is "unable to point to any language in the statute that supports its construction [of UMTRCA]."

Respondents' argument lacks both candor and substance. Petitioner has pointed precisely to the language in the statute upon which it relies to support its construction of UMTRCA. It is the same language adopted by Congress in Reorganization Plan No. 3 of 1970 by which the division of authority between EPA and AEC (now NRC) was created. And as the applicable case law demonstrates, by using the same or

substantially similar language in the amendments to the Atomic Energy Act contained in UMTRCA, and without a clear expression of an intent to change the meaning of the language, Congress intended the same meaning. Pet. at 11-12 and n.14. Indeed, the "plain meaning" of the statutory language in UMTRCA and every portion of its legislative history that addresses the issue specifically refutes the *post hoc* rationalizations developed by respondents in this case to support EPA's regulatory program.

Especially in light of the principles recognized in the decision of this Court on a related issue in *Train v. Colorado Public Interest Research Group, supra*, the instant case presents an important question of federal law with significant consequences that requires resolution by this Court.[1]

[1] This question can only be resolved by the Court's granting the petition for writ of certiorari in this case. A conflict between circuits on the question here presented is impossible because judicial review of EPA's regulations has not been, and cannot now be sought in any other Court of Appeals. *See* 42 U.S.C. § 2202(c)(2).

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

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